(10)

No. 90-143-CFX
Status: GRANTED

Title: Connecticut and John F. Digiovanni, Petitioners
v.
Brian K. Doehr

Docketed:
July 20, 1990

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Cohn,Henry S., Calamari,Andrew M.

Counsel for respondent: Faulkner,Joanne S.

Entry	Date	Note	Proceedings and Orders
1	Jul 20 1990	G	Petition for writ of certiorari filed.
2	Aug 16 1990		Brief of respondent Brian K. Doehr in opposition filed.
4	Aug 20 1990	G	Motion of Connecticut Bankers Association, et al. for leave to file a brief as amici curiae filed.
3	Aug 22 1990		DISTRIBUTED. September 24, 1990
5	Sep 10 1990	X	Reply brief of petitioners Connecticut, et al. filed.
6	Oct 1 1990		Motion of Connecticut Bankers Association, et al. for leave to file a brief as amici curiae GRANTED.
7	Oct 1 1990		Petition GRANTED.
			**********
9	Nov 14 1990		Brief of petitioner Connecticut filed.
10	Nov 14 1990	G	Motion of Connecticut Bankers Association, et al. for leave to file a brief as amici curiae filed.
8	Nov 15 1990		Joint appendix filed.
12	Nov 23 1990		SET FOR ARGUMENT MONDAY, JANUARY 7, 1991. (1ST CASE)
11	Nov 26 1990		Motion of Connecticut Bankers Association, et al. for leave to file a brief as amici curiae GRANTED.
13	Nov 27 1990		CIRCULATED.
14	Nov 28 1990		Record filed.
		*	Certified copy of original record and proceedings received.
15	Dec 14 1990		Lodging received.
16	Dec 17 1990	X	Brief of respondent Brian Doehr filed.
17	Dec 28 1990	X	Reply brief of petitioners Connecticut, et al. filed.
18	Jan 7 1991		ARGUED.
19	Jan 8 1991		Documents requested of counsel during argument received and distributed.
20	Jan 9 1991		Record filed.
		*	Certified copy of original record received.

(1)

90-143

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DIGIOVANNI,
Petitioners,

v.

BRIAN K. DOEHR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners

State of Connecticut:

BY: CLARINE NARDI RIDDLE
ATTORNEY GENERAL OF THE
STATE OF CONNECTICUT
ARNOLD B. FEIGIN
CAROLYN K. QUERIJERO
HENRY S. COHN*
Assistant Attorneys General
P.O. Box 120
Hartford, CT 06101
(203) 566-4990

John F. DiGiovanni:

BY: ANDREW M. CALAMARI
2429 Hering Avenue
Bronx, NY 10469
(212) 655-3636

*Counsel of Record

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Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED

Whether the Connecticut *ex parte* attachment of real estate statute, which provides for a pre-attachment, probable cause determination by a state court judge, based upon a factual affidavit; a prompt post-attachment hearing; and an immediate appeal, satisfies the due process requirements of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

In the United States District Court for the District of Connecticut the plaintiffs were Roland Pinsky, Jennie Pinsky, Eileen Fedowitz and Brian K. Doehr. The defendants were Richard K. Duncan, Joseph Golden Insurance Agency, Inc. and John F. DiGiovanni.

At the time of the Second Circuit decision, Roland Pinsky, Jennie Pinsky, Eileen Fedowitz, Richard K. Duncan and Joseph Golden Insurance Agency did not continue to participate in this litigation. Therefore they are not named as parties herein.

Intervention by the State of Connecticut as a party was permitted by the Second Circuit subsequent to oral argument therein. The only proper parties to this case at this time are petitioners State of Connecticut and John F. DiGiovanni and respondent Brian K. Doehr.

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In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DIGIOVANNI,
Petitioners,

v.

BRIAN K. DOEHR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, State of Connecticut, and John F. DiGiovanni, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit originally entered on March 9, 1990, amended in response to petitions for rehearing on April 25, 1990, and as modified on June 25, 1990.

OPINIONS OF THE COURTS BELOW

The original Judgment and Opinion of the United States Court of Appeals for the Second Circuit is reported at 898 F.2d 852 (2d Cir. 1990) and is printed in the appendix to this

brief at App. 1A.[1] A ruling issued on April 25, 1990, granting in part and denying in part petitions for rehearing, and amending the original judgment, is printed at App. 32A. An order refusing a suggestion for rehearing in *banc* was entered by the Second Circuit on May 30, 1990. App. 35A.

A modification of the ruling on Petitions for Rehearing was issued on June 25, 1990. App. 36A. An amended opinion on the Petitions, consolidating the Second Circuit's prior opinions of April 25, 1990, and June 25, 1990, was subsequently issued. App. 37A.

The memorandum of decision of the United States District Court for the District of Connecticut, *Eginton*, J., of February 17, 1989, is reported at 716 F. Supp. 58 (D. Conn. 1989). A copy of the opinion is printed in the Appendix. App. 40A.

The District Court directed the entry of judgment for the defendants in that decision. Judgment was entered on February 21, 1989, and is printed in the Appendix. App. 45A.

JURISDICTION

The original judgment and the opinion of the United States Court of Appeals for the Second Circuit were made and entered on March 9, 1990, and copies are printed in the Appendix. App. 1A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). This petition is filed within ninety days of the ruling of partial grant and partial denial of petitioners' timely petitions for rehearing, issued by the Court of Appeals on April 25, 1990, which amended the original judgment of the Court, and is printed at App. 32A. Supreme Court Rule 13.4. *Missouri v. Jenkins*, 58 U.S.L.W. 4480, 4483 (U.S. April 18, 1990). *See also* 28 U.S.C. § 2101(c).

[1] In this petition, the abbreviation "App." refers to the Appendix herein and the abbreviation "R." refers to the Joint Appendix filed in the Second Circuit, taken from the Record in the District Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions. U.S. Const. Amend. XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Conn. Gen. Stat. § 52-278e(a)(1):

> **Allowance of prejudgment remedy without hearing. Notice to defendant. Subsequent hearing and order.** (a) The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and 52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property. . . .

STATEMENT OF THE CASE

This petition arises from a civil action filed in the United States District Court for the District of Connecticut seeking, on federal due process grounds, to invalidate Conn. Gen. Stat. § 52-278e(a)(1),[2] the Connecticut prejudgment attachment of

[2] For the Court's convenience the entire chapter 903a of the Connecticut General Statutes, entitled "Prejudgment Remedies," is set forth at App. 54A-64A. The statute at issue herein — § 52-278e(a)(1) — is found in this chapter.

real estate statute. Jurisdiction was claimed in the District Court under 28 U.S.C. § 1331 and § 1343.

The District Court proceeding resulted from a Connecticut Superior Court civil action commenced on March 15, 1988. In the Superior Court for the Judicial District of New Haven at Meriden, John F. DiGiovanni ("DiGiovanni or Petitioner DiGiovanni") brought an action against Brian K. Doehr ("Doehr or Respondent Doehr") for an alleged assault and battery. App. 48A.

At the same time as the Superior Court action was instituted, and to secure the defendant's assets in the event of judgment, DiGiovanni applied for an attachment on real property of Doehr in the amount of $75,000. Pursuant to Conn. Gen. Stat. § 52-278c(a), DiGiovanni presented a judge of the Superior Court with the following: (1) an unsigned "writ, summons and complaint" setting forth his cause of action for assault and battery; (2) an application for prejudgment remedy reciting that the "prejudgment remedy requested is for an attachment of real property;" and (3) a factual affidavit of DiGiovanni demonstrating probable cause that judgment would be rendered in his favor. App. at 46A-48A.

Because DiGiovanni sought a real estate attachment rather than one on personal property, Conn. Gen. Stat. § 52-278e(a)(1), the statute at issue herein, exempted him from the further requirement of § 52-278c(a) that he schedule an adversary hearing prior to the Court's approval of the prejudgment remedy. Pursuant to § 52-278e(a)(1), after a probable cause review of DiGiovanni's papers, a judge of the Superior Court granted on March 17, 1988, the prejudgment remedy against Doehr's realty to the extent of $75,000. App. 49A.

Service of the attachment and complaint was subsequently made upon Doehr. At that time Doehr was given notice pursuant to § 52-278e(b) that he had a right to seek

a hearing to argue that the prejudgment remedy lacked probable cause or that it should be modified or vacated. He was also informed of his right to substitute a bond and to claim exemption from execution. App. 53A.

Instead of taking this course, Doehr, on August 8, 1988, brought suit against DiGiovanni in the United States District Court for the District of Connecticut, contending that § 52-278e(a)(1) was unconstitutional under the due process clause of the Fourteenth Amendment.[3]

Both plaintiff Doehr and defendant DiGiovanni moved for summary judgment in the District Court. R. 17, 24. The only "material facts" produced in accordance with Rule 56, Federal Rules of Civil Procedure and District Court local rule 9(c), were that (1) DiGiovanni had sued Doehr in state court, and (2) DiGiovanni was permitted an *ex parte* real estate attachment pursuant to § 52-278e(a)(1). R. 18, 25-27.

On February 16, 1989, the District Court, in response to this *facial* attack on the statute's constitutionality, granted judgment for Petitioner DiGiovanni. There were, the Court found, sufficient safeguards to protect a real property owner's due process rights. 716 F. Supp. 58, 60 (D. Conn. 1989), App. 43A.

Doehr appealed this decision to the United States Court of Appeals for the Second Circuit. Jurisdiction for this appeal was based upon 28 U.S.C. § 1291.

On March 9, 1990, the Second Circuit reversed in a decision containing three opinions. Judge Pratt concluded for the Court that § 52-278e(a)(1) was unconstitutional in violation

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[3] Two other plaintiffs joined Doehr, challenging § 52-278e(a)(1) out of wholly separate instances of attachment by different defendants. As indicated in the List of Parties, these other plaintiffs and defendants did not participate in the Court of Appeals for the Second Circuit and are not parties herein.

of due process because the statute permits attachments without prior notice and hearing in the absence of "extraordinary circumstances" and because the attaching party is not required to post an attachment bond. 898 F.2d at 858, App. 15A-16A.

Judge Mahoney, who found the conclusion "not entirely free from doubt," 898 F.2d at 859, App. 17A, concurred only in Judge Pratt's rationale regarding the lack of notice and hearing. He did not agree that a lack of a bond was a due process violation, as there were civil remedies which a debtor might pursue to recover for wrongful attachment. 898 F.2d at 860, App. 17A.

Judge Newman concluded in dissent that § 52-278e(a)(1) entirely satisfied due process, citing a unanimous opinion of the Connecticut Supreme Court and three individual Connecticut District Court decisions to support his view. 898 F.2d at 864, App. 31A.

In response to timely petitions for rehearing filed by petitioners, the Second Circuit on April 25, 1990, granted the petitions to the extent of making its March 9, 1990 holding prospective in effect. The remainder of the relief sought in the petitions was denied. App. 32A. On June 25, 1990, the Court modified its April 25, 1990 ruling to make the original opinion retroactive to cases challenging the constitutionality of the Connecticut statute filed prior to March 9, 1990, and still pending on that date. App. 36A.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THE CONNECTICUT SUPREME COURT.

Certiorari should be granted in this case because the Second Circuit has rendered a decision in conflict with decisions of the Connecticut Supreme Court upholding the constitutionality of the state statute at issue.

Judge Pratt's opinion struck down § 52-278e(a)(1) for failure to provide notice and hearing prior to the seizure. This decision relies heavily on two of the four significant cases in the area of prejudgment remedies, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (pre-suit garnishment of wages disapproved), and *Fuentes v. Shevin*, 407 U.S. 67 (1972) (replevin statute unconstitutional).[4] It gives little weight to the subsequent cases of *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) allowing an *ex parte* remedy and to *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) which explicitly sets forth the "saving characteristics" (*Id.* at 605-606) needed to sustain a pre-judgment *ex parte* seizure.[5]

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[4] *Fuentes v. Shevin* involved the total deprivation of personal property and is, as the dissent in *Pinsky* recognized, 898 F.2d at 862, 863, App. 26A-27A, hardly in point here. In *Fuentes* the Court struck down replevin statutes because they "work a deprivation of property without due process of law insofar as they deny the right to prior opportunity to be heard before *chattels* are taken from their possessor." 407 U.S. at 96 (emphasis added). In one instance a creditor had repossessed a stove and a stereo, in another a bed, a table, and other household goods. *Id.* at 70, 71. These seizures were especially harsh, the Court noting that the goods were "dearly bought and protected by contract . . ." *Id.* at 86.

[5] Nor does Judge Pratt's opinion consider the effect of the most recent Supreme Court decision considering the general issue involved. In *Zinermon v. Burch*, 58 U.S.L.W. at 4228 (U.S. February 27, 1990), this Court

(continued)

Indeed, prior to the instant case, the Second Circuit had stated, following *Mitchell* and *Di-Chem*, that the general rule was that "prejudgment *ex parte* attachments are constitutional if issued by a neutral judicial officer on the basis of factual representations regarding the merits of the plaintiff's claim and immediately followed by notice to the defendant and by an opportunity to contest the seizure." *McCahey v. L.P. Investors*, 774 F.2d 543, 548 (2d Cir. 1985).

In contrast to the Second Circuit, the Connecticut Supreme Court has relied on *Mitchell* and *Di-Chem* to sustain § 52-278e(a)(1). In *Fermont Div., Dynamics Corp. of America v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979), then Justice Peters[6] considered the constitutionality of § 52-278e.

Citing *Roundhouse Construction Corp. v. Telesco Masons Supplies Co.*, 168 Conn. 371, 380, 362 A.2d 778 (1975), the Court in *Fermont* considered whether the attachment procedure complies with due process "in its entirety" noting that "the lack of provision for a prior hearing in and of itself will not be constitutionally fatal if other saving characteristics are present." Justice Peters concluded:

> Section 52-278e exhibits all the saving characteristics that the law of procedural due process

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[5] *(continued)*
quoted in part from *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 19 (1978):

> " '[W]here the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination' a prior hearing may not be required."

This sets forth the proper standard of due process for Connecticut's *ex parte* real estate attachment process, where the length of deprivation is short and the harm to the attached party is much less severe than where chattels are seized. In this record there is no specific showing of harm.

[6] Hon. Ellen Ash Peters has, subsequent to *Fermont*, become Chief Justice of the Connecticut Supreme Court.

> requires. The statute provides for adequate judicial supervision of the entire process of seizure, and does not permit writs to be issued by a court clerk. The statute can be invoked only by a verified affidavit that contains factual, rather than merely conclusory, supporting allegations. Most important, the statute affords to the defendant whose property has been attached the opportunity to obtain an immediate postseizure hearing at which the prejudgment remedy will be dissolved unless the moving party proves probable cause to sustain the validity of his claim.

Id. at 397–398.

Fermont's holding that the entire section — now codified as § 52-278e(a) — meets due process was applied and reaffirmed in *Kukanskis v. Griffith*, 180 Conn. 501 (1980) to § 52-278e(a)(1), the attachment statute for real estate. There the Court recognized the importance *Fermont* had placed upon supplying a factual showing of probable cause prior to the seizure. The Court continued:

> Because § 52-278e(1) requires a factual showing that probable cause exists to sustain the validity of the plaintiff's claim, it comports with constitutional requirements. See also *Ledgebrook Condominium Assn., Inc. v. Lusk Corporation*, 172 Conn. 577, 583, 376 A.2d 60 (1977).

Id. at 505.[7]

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[7] The Connecticut Supreme Court has also held a virtually identical statute — allowing for the placement of lis pendens notice *ex parte* on the land records, followed by an immediate opportunity to dissolve — constitutional in *Williams v. Bartlett*, 189 Conn. 471, 457 A.2d 240 (1983). Significantly this Court dismissed an appeal in *Williams*, 464 U.S. 801 (1983). Under *Hicks v. Miranda*, 422 U.S. 322 (1975) this affirmance should have been binding on the Second Circuit in the instant case. Judge Pratt does not even cite to *Williams*, Judge Mahoney distinguishes the case, while Judge Newman believes it "indistinguishable" from *Pinsky*. *See also Spielman-Fond, Inc. v. Hanson's, Inc.*, 397 F. Supp. 997 (D.Ariz. 1973), *aff'd* 417 U.S. 901 (1974) (mechanic's lien satisfies due process).

The dissent in *Pinsky* had no doubt that the majority was in conflict with the Connecticut Supreme Court and Connecticut Federal District Court decisions. Judge Newman forcefully concludes as follows:

> Connecticut's procedure for prejudgment real estate attachments has been held to comport with due process requirements by a unanimous Connecticut Supreme Court, *see Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979) (Peters, J.), and by three judges of the District Court for the District of Connecticut, *see Shaumyan v. O'Neill*, 716 F. Supp. 65 (D. Conn. 1989) (Nevas, J.); *Pinsky v. Duncan*, 716 F. Supp. 58 (D. Conn. 1989) (Eginton, J.): *Read v. Jacksen*, Civ. No. B-85-85 (D. Conn. Feb. 18, 1988) (Zampano, J.). The opinions of now Chief Justice Peters in *Fermont* and of Judge Nevas in *Shaumyan* are particularly thoughtful and persuasive. Though in dissent, I am pleased to note my agreement with their views.

Id., 898 F.2d at 864–865, App. 31A.

This direct conflict between the *Pinsky* majority opinion in the Second Circuit and the highest court of the state justifies granting the writ of certiorari. Supreme Ct. Rule 10.1(a); *Lakeside v. Oregon*, 435 U.S. 333, 336, n.3 (1978); Stern, Gressman and Shapiro, *Supreme Court Practice* (6th ed. 1986) at 209.[8]

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[8] Review appears especially appropriate where the State Supreme Court and Federal Appellate Court differ over the constitutionality of State Court procedure. *Pennzoil v. Texaco, Inc.*, 481 U.S. 1 (1987). At this time at least two superior court judges have indicated that the State Supreme Court opinion controls, not the Second Circuit opinion. *Soden v. Johnson*, No. CV83-0067730-S (Stamford-Norwalk Superior Court, March 26, 1990); *Chase Manhattan Bank, N.A. v. Shea*, No. CV89-0102197-S (Stamford-Norwalk Superior Court, March 27, 1990).

II. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

Certiorari should be granted in this case because the United States Court of Appeals for the Second Circuit has rendered a decision in conflict with decisions of other Courts of Appeals on the same issue.

While the Second Circuit held that Connecticut's statute fails to meet due process standards because of the lack of a pre-attachment hearing, the Ninth Circuit has upheld the constitutionality of a Washington statute permitting the *ex parte* attachment of real property. In *Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505 (9th Cir. 1975), *cert. denied sub. nom., Hansen v. Weyerhaeuser Co.*, 425 U.S. 907 (1976),[9] the Court of Appeals found that the "challenged procedure comported with due process," *Id.* at 507, because it "provides for an early hearing at which the creditor is required to demonstrate that the writ was properly and regularly issued." *Id.* at 507. In reaching this conclusion, the Court specifically relied upon the standards set forth in *Mitchell* and *Di-Chem*, two cases distinguished by the Second Circuit.

A three-judge court[10] for the Middle District of North Carolina considered the constitutionality of the North Carolina statute[11] which permitted "the prejudgment attachment

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[9] The Court also explicitly found that the potential harm from a real estate attachment is much less significant than a seizure of personalty.

[10] This Court has treated federal three-judge Courts similar to Courts of Appeals for conflict purposes. *See, e.g., Memorial Hospital v. Maricope County*, 415 U.S. 250, 253 (1974).

[11] While the North Carolina statute did not apply, as does Connecticut's, to every attachment of realty, the Court in *Hutchinson* specifically did not rest its opinion on whether there were "extraordinary situations" set forth in the statute. The issue was whether *Mitchell* and *Di-Chem* sustained all *ex parte* real estate attachments. 392 F. Supp. at 895, n.8.

of real estate without prior notice and hearing" in *Hutchinson v. Bank of North Carolina*, 392 F. Supp. 888 (M.D.N.C. 1975). Applying *Mitchell* and *Di-Chem*, that Court held that there were extensive safeguards for the debtor, including an affidavit and post-seizure hearing, as well as a balanced protection of the creditor's rights. Moreover, unlike the *Pinsky* majority,[12] the three-judge Court in *Hutchinson* held that the test for constitutionality is "*not* confined to situations where there is a duality of interest in the attached property." *Id.* at 898 (emphasis in original). The remedy is available to all creditors or claimants regardless of prior or current interest in the premises.

The Third Circuit followed the *Hutchinson* approach in a case striking down Pennsylvania's foreign real estate attachment law. *Jonnet v. Sav. Bank of the City of New York*, 530 F.2d 1123 (3d Cir. 1976). According to *Jonnet*, seizures may be accomplished without prior notice and hearing only upon submission of a factual affidavit, which has been reviewed by a competent official; where there is protection for wrongful seizures; and where there is a right to an immediate post-attachment hearing. The defendant debtor should also have the right to substitute other property for the attached realty. *Id.* at 1129–1130. The Connecticut statute at issue in the present case, Conn. Gen. Stat. § 52-278e(a)(1), meets each of these criteria. Clearly the Second Circuit's analysis conflicts with the Third Circuit's.

The Fifth Circuit's summary of the relevant law is directly on point and again conflicts with the *Pinsky* majority. According to that Circuit: "[A]bsent pre-seizure notice and opportunity to be heard, prejudgment seizure is unconstitutional *unless* it is authorized by a judge with discretion to deny the writ and is promptly followed by a hearing, *or* unless

[12]Judge Pratt distinguishes *Mitchell*, which approved an *ex parte* seizure, because in *Mitchell* "the attached property is exclusively the property of the defendant . . . . The plaintiff hold[s] no present interest in the property sought to be seized." 898 F.2d at 855, App. 9A.

it occurs in an 'extraordinary situation.' " *Johnson v. America Credit Co. of Georgia*, 581 F.2d 526, 535 n.16 (5th Cir. 1978) (emphasis added).[13]

Thus there is a direct conflict between other Courts of Appeals and the majority decision of the Second Circuit in *Pinsky*. The conflict justifies this Court in issuing a writ of certiorari. Supreme Ct. Rule 10.1(a).

[13]The contrary *Pinsky* rule is as follows: "[A] prior hearing may be postponed where exceptional circumstances justify such a delay, *and where* sufficient additional safeguards are present." 898 F.2d at 855, App. 8A (emphasis in original). This is not the law in the Ninth, Third or Fifth Circuits. *See also Shaumyan, supra* at note 6; *Christiano v. Court of the Justices of the Peace*, 669 F. Supp. 662, 669 (D. Del. 1987).

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this Petition should be granted and a writ of certiorari should issue to review the judgment and opinion of the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted.

Petitioner
STATE OF CONNECTICUT:

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

ARNOLD B. FEIGIN
Assistant Attorney General

CAROLYN K. QUERIJERO
Assistant Attorney General

HENRY S. COHN
Counsel of Record
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, Connecticut 06101
(203) 566-4990

Petitioner
JOHN F. DIGIOVANNI:

ANDREW M. CALAMARI, ESQ.
2429 Hering Avenue
Bronx, New York 10469
(212) 655-3636

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In The
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STATE OF CONNECTICUT,
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 201—August Term 1989

Argued: October 5, 1989 Decided: March 9, 1990

Docket No. 89-7521

ROLAND PINSKY, JENNIE PINSKY, EILEEN FEDOWITZ and BRIAN K. DOEHR,

Plaintiffs-Appellants,

—against—

RICHARD K. DUNCAN, JOSEPH GOLDEN INSURANCE AGENCY, INC. and JOHN F. DI GIOVANNI,

Defendants,

RICHARD K. DUNCAN and JOHN F. DI GIOVANNI,

Defendants-Appellees,

STATE OF CONNECTICUT,

Intervenor.

Before:

NEWMAN, PRATT, and MAHONEY,

Circuit Judges.

Appeal from summary judgment of United States District Court for the District of Connecticut, Warren W. Eginton, *Judge*, dismissing complaint that challenged, on due process grounds, Connecticut statute governing prejudgment attachment of real estate.

Reversed.

Judge Mahoney concurs in a separate opinion; Judge Newman dissents in a separate opinion.

JOANNE S. FAULKNER, New Haven, CT, *for Plaintiff-Appellant Brian K. Doehr.*

ANDREW M. CALAMARI, Bronx, NY (Calamari & Calamari, of Counsel), *for Defendant-Appellee John F. Di Giovanni.*

Henry S. Cohn, Hartford, CT, Assistant Attorney General of the State of Connecticut (Clarine Nardi Riddle, Attorney General of the State of Connecticut, of Counsel), *for Intervenor.*

PRATT, *Circuit Judge*:

In this appeal we consider the constitutionality of a statute that authorizes prejudgment attachment of real estate without prior notice and opportunity for a hearing, and without requiring the person obtaining the attachment to post a bond. Conn. Gen. Stat.

§ 52-278e(a)(1). Brian K. Doehr, a Connecticut landowner whose property was attached under this statute, appeals from a summary judgment of the United States District Court for the District of Connecticut, Warren W. Eginton, *Judge*, reported at 716 F. Supp. 58. Doehr claims that § 52-278e(a)(1) is unconstitutional on its face. For the reasons below, we agree. We therefore reverse and remand for entry of judgment in favor of Doehr.

BACKGROUND

Attachment is an extraordinary prejudgment remedy that enables a plaintiff to secure a contingent lien on defendant's property at the inception of a lawsuit. It has traditionally served the dual purposes of compelling the appearance of a defendant who cannot otherwise be haled into court, and providing security for any judgment that plaintiff might ultimately recover. *See* 7 C.J.S. *Attachment* § 4 (1980).

Under Connecticut law, a prejudgment attachment may sometimes be obtained after notice to defendant and a hearing, Conn. Gen. Stat. §§ 52-278c, 52-278d, or, in some cases, even without notice and a hearing. § 52-278e. In neither case is the plaintiff required to post a bond or other security for the payment of damages the defendant may sustain either if the attachment is wrongfully issued or the plaintiff's claim ultimately proves to be meritless. The portion of the statute governing the *ex parte* attachment of real estate provides in relevant part:

> The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and

52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property * * *.

In March 1988, John F. Di Giovanni commenced an action for assault and battery against Doehr in Connecticut Superior Court. At the inception of this lawsuit, and before any process had been served on Doehr, Di Giovanni applied for an attachment on Doehr's property in Meriden, Connecticut. As required by the statute, Di Giovanni submitted an affidavit in support of his application, in which he stated that "I was willfully, wantonly and maliciously assaulted by the defendant, Brian K. Doehr. * * * Said assault and battery broke my left wrist and further caused an ecchymosis to my right eye, as well as other injuries to my head, limbs and body. * * * In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff." Based on these submissions, the state court authorized an attachment on Doehr's home to the value of $75,000.

Rather than moving to dissolve the attachment, as he was entitled to do under the statute, § 52-278e(c), Doehr filed the present action in federal district court, alleging that Connecticut's *ex parte* attachment procedure violated his constitutional right to due process. On Di Giovanni's motion for summary judgment, the district court held that § 52-278e is constitutional because "it requires the prejudgment remedy to be issued by a judge", " 'can be invoked only by a verified affidavit that contains factual, rather than merely conclusory, supporting allegations' ", *quoting Fermont Div.*,

Dynamics Corp. of America v. Smith, 178 Conn. 393, 397, 423 A.2d 80 (1979), and provides for a "prompt post-seizure hearing" at which the property owner may challenge the attachment. 716 F. Supp. at 60. Doehr now appeals that ruling.

Since the constitutionality of a state statute "affecting the public interest is drawn in question" by this lawsuit, the district court was required to "certify such fact to the attorney general of the State" for the purpose of allowing the state to intervene on the constitutional issue. 28 U.S.C. § 2403(b). Although the district court failed to follow this procedure, we invited the state to file an intervenor's brief in this appeal, consistent with our resolution of a similar problem in *Merrill v. Town of Addison*, 763 F.2d 80, 82-83 (2d Cir. 1985). The state elected to intervene, and we give careful consideration to its arguments in this decision.

DISCUSSION

A. *Deprivation of a Protected Property Interest?*

As a threshold matter, we must determine whether the "seizure" at issue in this case—a nonpossessory attachment of real estate—deprives the owner of a significant property interest within the meaning of the fourteenth amendment. Di Giovanni argues that our decision on this point is controlled by the Supreme Court's summary affirmance of *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973) (three-judge court) (per curiam), which held that "the filing of mechanic's and materialmen's lien does not amount to a taking of a significant property interest". *Id.* at 999, *aff'd mem.*, 417 U.S. 901 (1974). However, notwithstanding the lim-

ited precedential value of a summary affirmance, *see, e.g., Tulley v. Griffin, Inc.*, 429 U.S. 68, 74 (1976), we note that the mechanic's lien statute upheld in *Spielman-Fond* required the creditor to have a pre-existing right to the property, whereas Connecticut's attachment procedure is available in a variety of contexts, including the present case, to individuals having no preexisting interest in the property to be attached.

Moreover, although an attachment of real estate does not deprive the landowner of the use and possession of his property, and thus does not amount to a "seizure" in the literal sense, it nevertheless has a significant impact on the owner's ability to exercise the full scope of his property rights. An attachment not only impairs the marketability of the real estate, but also may harm the owner's credit rating, and may prevent him from using the property as collateral for a loan. Even if short-lived, these effects are certainly worthy of due process protection. *See Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) ("The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property"). Consequently, we hold that a nonpossessory attachment of real estate deprives the owner of a constitutionally protected property interest under the fourteenth amendment. *Accord Shaumyan v. O'Neill*, 716 F. Supp. 65, 77-79 (D. Conn. 1989); *MPI v. McCullough*, 463 F. Supp. 887, 901 (N.D. Miss. 1978); *Terranova v. AVCO Financial Servs.*, 396 F. Supp. 1402, 1406-07 (D. Vt. 1975) (three-judge court); *Hutchison v. Bank of N.C.*, 392 F. Supp. 888, 894 (M.D.N.C. 1975) (three-judge court); *Bay State Harness Horse Racing & Breeding Assn. v. PPG Indus., Inc.*, 365 F. Supp. 1299, 1304-06 (D. Mass. 1973) (three-judge court); *Gunter v. Merchants Warren Nat'l Bank*, 360 F. Supp. 1085, 1090

(D. Me. 1973) (three-judge court); *Clement v. Four N. State St. Corp.*, 360 F. Supp. 933, 935 (D.N.H. 1973) (three-judge court).

B. *Ex Parte Attachment.*

Doehr argues that § 52-278e(a) is invalid, first, because it dispenses with prior notice and opportunity for a hearing even in the absence of exigent circumstances. A "root requirement" of due process is the right to a hearing before being deprived of a significant property interest unless the state demonstrates "some valid governmental interest * * * that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (footnote omitted); *see also United States v. Premises & Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1263 (2d Cir. 1989). Thus, in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969), the Court emphasized that state garnishment procedures must ordinarily provide for a pre-deprivation hearing except in situations "requiring special protection to a state or creditor interest". In *Fuentes* the Court made it clear that the type of "extraordinary circumstances" that warrant postponing the hearing "must be truly unusual", such as the need "to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, [or] to protect the public from misbranded drugs and contaminated food." 407 U.S. at 90-92 (citations omitted).

Although the Court later upheld a Louisiana sequestration statute that authorized the seizure of personal property without notice and opportunity for a hearing, *see Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), the application of that statute was explicitly limited to

unusual situations where "it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." *Id.* at 605. Because the creditor in *Mitchell* claimed a preexisting right to consumer goods held by the debtor, and because the creditor's lien would expire under Louisiana law the moment the debtor transferred possession, any prior notice would enable the debtor to transfer the goods before the hearing and thereby defraud the creditor. Thus there was a compelling reason to postpone notice and hearing until after the sequestration had initially taken effect. As the Court put it, "there is a real risk that the buyer, with possession and power over the goods, will conceal or transfer the merchandise to the damage of the seller. This is one of the considerations weighed in the balance by the Louisiana law in permitting initial sequestration of the property. * * * [N]otice itself may furnish a warning to the debtor acting in bad faith." *Id.* at 609.

The rule to be derived from *Sniadach* and its progeny, therefore, is not that post-attachment hearings are generally acceptable provided that plaintiff files a factual affidavit and that a judicial officer supervises the process, but that a prior hearing may be postponed where exceptional circumstances justify such a delay, *and where* sufficient additional safeguards are present. *See Terranova*, 396 F. Supp. at 1407 ("The Supreme Court decisions in [*North Georgia Finishing*, *Mitchell*, *Fuentes*, and *Sniadach*] dictate that *except in extraordinary situations* the prejudgment attachment of real estate belonging to an in-state resident may be effected only after notice to the owner and a hearing") (emphasis added) (footnotes omitted). The only decision in the *Sniadach*

line of cases to find a post-deprivation hearing constitutionally acceptable, *Mitchell*, carefully limited the reach of its holding to the particular circumstances of the case:

> Plainly enough, this is *not* a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is *not* whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized.

416 U.S. at 604 (emphasis added); *see also North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601, 609 (1975) (Powell, J., concurring) (suggesting that *Mitchell* has been relegated "to its narrow factual setting").

In sharp contrast to *Mitchell*, the case before us *does* present a situation where the attached property "is exclusively the property of the defendant", and where the plaintiff "hold[s] no present interest in the property sought to be seized." Di Giovanni sued Doehr because Doehr allegedly assaulted him, breaking his wrist, blackening his eye, and causing various other injuries. Assuming the truth of these bare allegations, and without giving Doehr an opportunity to present his own version of the facts, the court issued an attachment on Doehr's home. There were no allegations that Doehr was about to fraudulently dispose of his home, nor was the attachment necessary to obtain personal jurisdiction over Doehr. Since exigent circumstances of this nature clearly formed the basis for permitting an *ex parte* seizure in *Mitchell*, we can hardly rely on *Mitchell* to uphold a procedure that makes such circumstances irrelevant to the inquiry.

The highly factual nature of the issues involved in the *ex parte* proceeding gives us further reason to doubt the adequacy of existing procedures. The dispositive issues in the *ex parte* proceeding in *Mitchell* were simply whether the creditor possessed a lien on goods in the debtor's possession, and whether the debtor had defaulted on his payments. The Court stressed that these were "uncomplicated matters that lend themselves to documentary proof" and that "[t]he nature of the issues at stake minimizes the risk that the writ will be wrongfully issued by a judge." 416 U.S. at 609-10. Distinguishing *Fuentes*, the Court observed:

> In Florida and Pennsylvania property was only to be replevied in accord with state policy if it had been "wrongfully detained." This broad "fault" standard is inherently subject to factual determination and adversarial input. * * * [I]n *Fuentes* this fault standard for replevin was thought ill-suited for preliminary *ex parte* determination. In Louisiana, on the other hand, the facts relevant to obtaining a writ of sequestration are narrowly confined. As we have indicated, documentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default. There is thus far less danger here that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing which will be immediately available in any event.

Id. at 617-18; *see also Mathews v. Eldridge*, 424 U.S. 319, 343-44 (1976) (medical determination of disability is "sharply focused and easily documented", and thus "[t]he potential value of [a pre-deprivation] evidentiary

hearing * * * is substantially less in this context than in *Goldberg [v. Kelley*, 397 U.S. 254 (1970)]").

Unlike the procedures upheld in *Mitchell* and *Mathews*, Connecticut's *ex parte* proceeding involves the court in a host of difficult factual questions. To issue an attachment, the judge must determine whether "there is probable cause to sustain the validity of the plaintiff's claim". § 52-278e(a). The statute is not limited to simple debtor-creditor disputes, where the likelihood of recovery often can be ascertained from documentary proof submitted by the creditor. Instead, the attachment procedure is available in all civil actions, including those arising from such fact-specific events as fist fights, as illustrated by the facts of the present action. In such a case, how can the judge realistically determine the factual validity of the claim when presented with only the plaintiff's version of the altercation? Requiring the plaintiff to file a factual affidavit, though certainly helpful, is of little assistance when the affidavit merely recites facts that are certain to be sharply disputed by the other party. Because the risk of a wrongful attachment is considerable under these circumstances, we conclude that dispensing with notice and opportunity for a hearing until after the attachment, without a showing of extraordinary circumstances, violates the requirements of due process.

Despite the highly error-prone nature of Connecticut's pre-attachment procedure, Di Giovanni and the state insist that the private interest at stake is so minuscule that a prior hearing is not constitutionally required. We are unpersuaded by this argument. An attachment can have a substantial impact on a landowner's ability to sell his property, secure a loan, or obtain credit. Given a

particularly unlucky set of circumstances, even a temporary attachment can lead to foreclosure proceedings against the homeowner. *See Hiers v. Cohen*, 31 Conn. Supp. 305, 329 A.2d 609 (Super. Ct. Hartford Co. 1973). In any event, the individual's interest in a prior hearing certainly outweighs the state's interest in postponing the hearing until after attachment, which, in the absence of unusual circumstances, is practically nil. *See Shaumyan*, 716 F. Supp. at 81 (state's interest "seems minimal at best").

C. *Attachment Bond.*

Doehr claims that § 52-278e is also defective because it does not require the plaintiff to post a bond or other security before obtaining an attachment. Most state attachment statutes include at least some procedure for indemnifying the defendant for any loss caused by a wrongful attachment. *See Shaumyan*, 716 F. Supp. at 81. In *Mitchell*, for example, the Louisiana sequestration statute required the plaintiff to file a bond "sufficient • • • to protect the [defendant] against all damages in the event the sequestration is shown to have been improvident." 416 U.S. at 606. The statute further empowered the court to assess damages in favor of the defendant, including attorney's fees, "whether the writ is dissolved on motion or after trial on the merits." *Id.* at 617. These damages were not limited to actual out-of-pocket losses, but included "injury to social standing or reputation as well as humiliation and mortification." *Id.* at 606 n.8.

The *Mitchell* Court clearly found the bond requirement of the Louisiana statute to play an essential role in protecting the defendant from the effects of an erroneous seizure. *See* 416 U.S. at 610, 617. Justice Powell, in his concurring opinion in *North Georgia Finishing*, stated that "the provision of adequate security" is an indispensable procedural safeguard, 419 U.S. at 611, and four circuit courts have expressed the view that the lack of a bond or damages provision would invalidate an attachment statute. *See Watertown Equip. Co. v. Norwest Bank Watertown*, 830 F.2d 1487, 1493-94 (8th Cir. 1987) ("Clearly, the centrality of an adequate bond for the protection of the debtor was well established by 1975."), *cert. denied*, 108 S. Ct. 1723 (1988); *Jones v. Preuit & Mauldin*, 822 F.2d 998, 1002 (11th Cir. 1987) (debtor's "financial interest must be protected in the event of a wrongful prejudgment attachment, either via the posting of a bond by the creditor who seeks the writ, or by allowing an action for damages suffered as a result of a wrongful attachment"), *vacated on other grounds*, 851 F.2d 1321 (11th Cir. 1988) (in banc), *vacated and remanded mem.*, 109 S. Ct. 1105 (1989); *United States v. Vertol H21C, Reg. No. N8540*, 545 F.2d 648, 652 (9th Cir. 1976); *Jonnet v. Dollar Savings Bank of City of New York*, 530 F.2d 1123, 1130 (3d Cir. 1976) ("[T]he Pennsylvania attachment rules offer no machinery to indemnify a defendant for damages due to wrongful attachment • • • . A constitutionally valid statute must afford such protection, by bond or otherwise.").

The state concedes that defendants must be protected against the wrongful attachment of their property, but insists that Connecticut's vexatious litigation statute, Conn. Gen. Stat. § 52-568, provides adequate protection. Under that statute,

> Any person who commences and prosecutes any civil action or complaint against another, in his own name, or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages.

The state argues that this remedy is all that due process requires, an assertion that, on the surface, appears to find support in the eleventh circuit's dictum in *Jones* that a debtor's interests can be adequately protected "*either* via the posting of a bond by the creditor who seeks the writ, *or* by allowing an action for damages suffered as a result of a wrongful attachment." *Jones*, 822 F.2d at 1002 (emphasis added); *see also Shaumyan*, 716 F. Supp. at 80-81 (suggesting that *Jones* makes a separate action for damages "an option to the pre-seizure posting of a creditor's bond"). The "action for damages" discussed in *Jones*, however, was made part of the attachment procedure itself, and the creditor was required to post a bond to cover any such damages. *See Jones*, 822 F.2d at 1003-04 (discussing Ala. Code §§ 35-11-111 and 6-6-148). Thus in *Jones* the defendant could both challenge the propriety of the attachment and recover his damages in the same proceeding, held "before, during, or after the action in which the debtor appears as a defendant." *Jones*, 822 F.2d at 1004 (citing *First National Bank v. Cheney*, 120 Ala. 117, 23 So. 733 (1897)).

It is entirely different to require the defendant, as Connecticut does, to wait for judgment in the underlying action, and only then prosecute a claim for vexatious litigation. This subjects the defendant not only to the delay and expense of additional litigation, but deprives him of any remedy whatsoever if the underlying action is settled. *Blake v. Levy*, 191 Conn. 257, 464 A.2d 52 (1983) ("When a lawsuit ends in a negotiated settlement or compromise, it does not terminate in the plaintiff's favor and therefore will not support a subsequent lawsuit for vexatious litigation."). This is particularly troubling in view of the fact that the mere existence of the attachment may weigh heavily in the defendant's decision to reach a settlement. *See* Note, *The Constitutionality of Real Estate Attachments*, 37 Wash. & Lee L. Rev. 701 n.1 (1980) ("Today attachment, if available, is often used as a tactical maneuver to put pressure on a defendant to reach an expeditious settlement of a legal dispute.") (citing New York Judicial Council, *Seventh Annual Report* 391-93 (1941)); Kheel, *New York's Amended Attachment Statute: A Prejudgment Remedy in Need of Further Revision*, 44 Brooklyn L. Rev. 199, 201 (1978) (attachment "can lead a defendant to settle a dispute promptly although he may think it likely that he would ultimately prevail against plaintiff's claim").

For these reasons, we believe that Connecticut's vexatious litigation statute offers inadequate protection against wrongful attachment, and we conclude that the lack of a bond or security provision in the attachment procedure itself is a flaw of constitutional magnitude.

CONCLUSION

We hold that Conn. Gen. Stat. § 52-278e violates the requirements of due process because (1) it permits the issuance of *ex parte* attachments in the absence of

extraordinary circumstances, and (2) it fails to require the plaintiff to post a bond or other security before obtaining the attachment. The judgment of the district court is reversed and the case is remanded for entry of judgment in favor of Doehr declaring § 52-278e unconstitutional.

MAHONEY, *Circuit Judge*, concurring in the result:

I agree with Judge Pratt that Conn. Gen. Stat. § 52-278e(a)(1) (West Supp. 1989) is unconstitutional under the fourteenth amendment because, in providing for attachment of real property in civil actions without any pre-attachment hearing, it authorizes deprivations of property without due process of law. I reach this conclusion, however, only because this provision allows attachments of real property whenever a plaintiff makes a sworn showing to a judge "that there is probable cause to sustain the validity of the plaintiff's claim," without any further requirement of exceptional or extraordinary circumstances to justify the attachment. By contrast, when personal property is attached, the same statute (in the same sentence) requires the plaintiff to establish, in addition to the threshold probable cause showing—

> that there is reasonable likelihood that the defendant (A) neither resides in nor maintains an office or place of business in this state and is not otherwise subject to jurisdiction over his person by the court, or (B) has hidden or will hide himself so that process cannot be served on him or (C) is about to remove himself or his property from this state or (D) is about to fraudulently dispose of or has fraudulently disposed of any of his property with

> intent to hinder, delay or defraud his creditors or (E) has fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of his debts or (F) has stated he is insolvent or has stated he is unable to pay his debts as they mature.

Conn. Gen. Stat. § 52-278e(a)(2) (West Supp. 1989).

I do not agree, however, with Judge Pratt's conclusion "that the lack of a bond or security provision in the attachment procedure itself is a flaw of constitutional magnitude," and therefore write separately.

Turning first to the areas of my agreement with Judge Pratt's thoughtful opinion, I concur that an attachment results in the deprivation of a constitutionally protected property interest. The deprivation is concededly less severe than in the cases, for example, of a seizure of property or a garnishment of wages. In my view, however, the reasons articulated and precedents cited by Judge Pratt establish that although this consideration impacts upon the extent of constitutionally required protection, *some* such protection in the case of an attachment of real property is warranted.

I also concur that the absence of any requirement of extraordinary circumstances in the case of an attachment of real property renders section § 52-278e(a)(1) unconstitutional, although this conclusion is not entirely free from doubt. Since Judge Pratt has stated the case for this position with both clarity and force, I will confine myself to addressing two objections to it that seem, at least to me, to merit consideration.

First, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975), can be read to intimate that

only an "early hearing," and not necessarily a pre-attachment hearing, is constitutionally required. In that event, the provision in section 52-278e(c) for an expeditious post-attachment hearing, at which the owner of property subjected to the attachment may challenge the initial determination of probable cause, would render section 52-278e(a)(1) constitutionally valid.

Second, Conn. Gen. Stat. §§ 52-325, 52-325a and 52-325b (West Supp. 1989), which make the lis pendens procedure routinely available in actions "intended to affect real property" and, like section 52-278e, provide only for a post-filing hearing, were upheld against constitutional challenge in *Williams v. Bartlett*, 189 Conn. 471, 457 A.2d 290, *appeal dismissed for want of a substantial federal question*, 464 U.S. 801 (1983). The Supreme Court's dismissal of this appeal was a dismissal on the merits and a binding precedent, *see Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 4014, at 638-39 (1977 & Supp. 1989), although "not entitled to the same deference given a ruling after briefing, argument, and a written opinion." *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979). *Williams* provides an arguable precedent for upholding section 52-278e(a)(1) against a due process challenge.

As we recently said, however:

> As a general rule, due process has been held to require notice and an *opportunity to be heard prior to the deprivation of a property interest*, see *Fuentes v. Shevin*, 407 U.S. 67, 81-82, 92 S.Ct. 1983, 1994-95, 32 L.Ed.2d 556 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823, 23 L.Ed.2d 349 (1969), *in the absence of an " 'extraordinary situation[ ]' "* that justifies postponing notice and opportunity for hearing. *Fuentes*, 407 U.S. at 90, 92 S.Ct. at 1999 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971)). But see *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611-19, 94 S.Ct. 1895, 1902-06, 40 L.Ed.2d 406 (1974).

United States v. Premises & Real Property at 4492 S. Livonia Rd., 889 F.2d 1258, 1263 (2d Cir. 1989) (emphasis added), *reh'g denied*, No. 88-6040, slip op. (2d Cir. Mar. 2, 1990). I see no basis to depart from this rule here. Although *Livonia* involved a seizure, all members of the present panel apparently agree that a constitutional "deprivation of a property interest" results from an attachment of real property. Connecticut's interest in routinely allowing pre-hearing attachments in all cases where the attachment is directed to real property and the plaintiff can make an *ex parte* showing of probable cause regarding the merits, on the other hand, seems virtually nugatory in terms of the standards articulated by the Supreme Court and outlined in *Livonia*.

I would not read *Di-Chem* to establish that any "early hearing" imparts constitutional validity to a deprivation of a property interest, whether the hearing occurs before or promptly after the challenged deprivation. The phrase "early hearing" was addressed to a statutory scheme which provided no hearing at any time during the pendency of the litigation to challenge the *bona fides* of the plaintiff's garnishment. I see no warrant for seizing upon this phrase to undercut the general

thrust of the Supreme Court's rulings in this area, as we have recently summarized them in *Livonia*. This is especially so since *Livonia* relies heavily on *Fuentes v. Shevin*, 487 U.S. 67 (1972), and two separate opinions in *Di-Chem* regard that case's main impact to be a reassertion of the authority of *Fuentes*. *See Di-Chem*, 419 U.S. at 608 (Stewart, J., concurring); 419 U.S. at 609 (Powell, J., concurring in the judgment).

Similarly, I would not read the Supreme Court's dismissal of the appeal in *Williams v. Bartlett* as a wholesale authorization of pre-hearing attachments of real property without regard to exceptional circumstances. As stated earlier, such a Supreme Court determination has precedential force, but of a limited nature. Even if this ruling can be read to intimate a more relaxed view of constitutional requirements where a provisional remedy leaves an owner with the use and occupancy of real property, I see little warrant, reading this summary ruling in the overall context of the Supreme Court's opinions in this area, to extend the relaxation beyond the lis pendens procedure. In the case of a lis pendens, the plaintiff has an interest in the specific property in question, *see Williams*, 189 Conn. at 479-80, 457 A.2d at 294 (lis pendens function of preventing prejudgment transfer of property particularly important, because of uniqueness of real estate, where plaintiff seeks specific performance relative to affected property), and the state has a more sharply defined interest in this "specified procedure whereby the rights of third-party purchasers are readily defined," *id.*

In sum, for the reasons stated at greater length and with considerably greater force by Judge Pratt, I concur in his conclusion that section 52-278e(a)(1) is constitu-

tionally defective because, unlike subdivision (2) of the same section (and sentence) dealing with personal property, it includes no requirement of extraordinary circumstances for the attachment of real property prior to any adversary hearing concerning that attachment. This brings me to my point of disagreement with Judge Pratt's opinion.

As indicated earlier, I do not agree that section 52-278e is constitutionally defective because it does not require a plaintiff to post a bond or other security before obtaining an attachment. Judge Pratt apparently accepts the ruling in *Jones v. Preuit & Mauldin*, 822 F.2d 998 (11th Cir. 1987), *vacated on other grounds*, 851 F.2d 1321 (11th Cir. 1988) (in banc), *vacated and remanded mem.*, 109 S.Ct. 1105 (1989), that a debtor's "financial interest must be protected in the event of a wrongful prejudgment attachment, *either* via the posting of a bond by the creditor who seeks the writ, *or* by allowing an action for damages suffered as a result of a wrongful attachment." *Id.* at 1002 (emphasis added). He observes, however, that the statute considered in *Jones* allowed the defendant to challenge the propriety of the attachment and recover his damages in the same proceeding, whereas he deems the pertinent Connecticut provision, Conn. Gen. Stat. § 52-568(a) (West Supp. 1989), to require the defendant to bring a separate action for damages. He further concludes that the requirement of a separate action presents a distinction of constitutional dimension.

I would hesitate to join in this conclusion, which seems to break new ground in its interpretation of due process requirements. I do not believe that we need reach this question, however, because I disagree with the

reading of Connecticut law upon which it is premised. Specifically, it would appear that the challenge of a defendant to an attachment pursuant to section 53-278e(a)(1) could be litigated, pursuant to the Connecticut vexatious litigation statute, Conn. Gen. Stat. § 52-568(a) (West Supp. 1989), at the conclusion of the litigation in which the attachment occurred. In *Hydro Air of Conn., Inc. v. Versa Technologies*, 99 F.R.D. 111 (D. Conn. 1983), where a defendant was allowed to plead a counterclaim pursuant to section 52-568(a), the court said:

> Of course, a ruling on [defendant's] counterclaim must await a decision on the merits of [plaintiff's] complaint. As a matter of judicial economy, the court will permit [defendant] to raise its claim that the instant suit is vexatious as a counterclaim. In this way, the question of whether [plaintiff] has sued vexatiously can be considered along with the merits of that claim and a decision on the counterclaim rendered speedily after the main suit is terminated, without the necessity of a separate proceeding. Cf. Fed.R.Civ.Pro. 54(b). *Compare Paint Products Co. v. Minwax Co.*, 448 F.Supp. 656, 658 (D.Conn.1978) (Daly, J.) ("Given the requirement that the suit must terminate in favor of the defendant, it is impossible to use vexatious litigation as a counterclaim in the very suit the defendant claims is vexatious.") with *Sonnichsen v. Streeter*, 4 Conn. Cir. 659, 666-67, 239 A.2d 63 (1967) ("There appears to be no practical need for further litigation, and justice will best be served if the residuum of issues be terminated in the present suit.").

99 F.R.D. at 113.

As this quotation indicates, a prior decision of the same court, *Paint Products Co.*, takes a view opposed to that expressed in *Hydro Air. Paint Products Co.*, however, does not cite *Sonnichsen v. Streeter*, which appears to establish a Connecticut rule that damages for vexatious litigation may be recovered by counterclaim in the very action which constitutes the vexatious litigation. *See Sonnichsen*, 4 Conn. Cir. Ct. at 665-68, 239 A.2d at 67-69. I therefore conclude that section 52-568(a) cures any constitutional deficiency that might otherwise result from the failure of section 52-278e to include a bond or security requirement for the plaintiff.

It is true, as Judge Pratt points out, that the statutory remedy provided by Connecticut would not be available where a case settles. As a practical matter, however, most settlements would require a defendant to release an attaching plaintiff from further liability to the defendant, whatever the statutory or other basis of the defendant's rights and remedies vis-a-vis the attachment.

I note, finally, that an invalidation of section 52-278e on this separate ground in its application to real property (subdivision (1)) would apply with equal force, by necessary implication, to the application of this section to personal property (subdivision 2). There is no distinction between these subdivisions with respect to the failure of the attachment statute to include a bond or security requirement for the plaintiff. Accordingly, if the Connecticut vexatious litigation statute, section 52-568(a), is not deemed to cure the perceived deficiency as to real property, it would be equally ineffective with respect to personal property, and section 52-278e would be unconstitutional *in toto* for failure to include a bond or security requirement for the plaintiff.

In sum, I concur in Judge Pratt's opinion for the court to the extent that it invalidates Conn. Gen. Stat. § 52-278e(a)(1) for its authorization of attachments of real estate in civil cases prior to any adversary hearing, on the basis of an *ex parte* showing "that there is probable cause to sustain the validity of the plaintiff's claim," but do not join that opinion in its ruling that "the lack of a bond or security provision in the attachment procedure itself is [an additional] flaw of constitutional magnitude."

JON O. NEWMAN, *Circuit Judge* (dissenting):

Because I do not believe that the Connecticut prejudgment remedy for attaching real property is unconstitutional, I respectfully dissent.

Connecticut permits any person starting a lawsuit to file on the land records an attachment of the real property of the defendant. Conn. Gen. Stat. § 52-278e(a)(1). This prejudgment remedy assures the plaintiff a source of funds in the event the lawsuit is successful. To obtain this attachment the plaintiff must present sworn evidence sufficient to persuade a state court judge at an *ex parte* hearing that probable cause exists to believe that the lawsuit will be successful. *Id.* If an attachment is permitted, the defendant is entitled to an "expeditious" adversary hearing at which the attachment will be dissolved unless the plaintiff establishes probable cause in the context of an adversary hearing. *Id.* § 52-278e(c). Connecticut permits appellate review of an order denying a motion to dissolve an attachment. *Id.* § 52-278*l*(a). To assure that a defendant becomes aware of his right

to challenge an *ex parte* real estate attachment, Connecticut requires the attaching plaintiff to serve the defendant with notice of his right to a hearing to challenge the claim of probable cause, to request that the attachment be vacated or modified, or that a bond be substituted, or to claim exemption from attachment. *Id.* 52-278e(b). Connecticut also permits a defendant to recover double damages for commencing a civil lawsuit without probable cause. *Id.* § 52-568(a)(1) (West Supp. 1989).

The Court concludes that these protections fall short of the requirements of the Due Process Clause. The Court believes that a real estate attachment may not be issued until probable cause has been established at an adversary hearing. In addition, Judge Pratt believes that due process requires Connecticut to condition the grant of an attachment on the plaintiff's posting a bond for damages in the event the attachment is determined to be wrongful and to provide a damage remedy for wrongful attachment as part of the attachment scheme, rather than as part of the general remedy for vexatious litigation. However, since this latter point does not command the support of a majority of the panel, it is not a requirement imposed by today's ruling.

The Due Process Clause is not a code of civil procedure. It assures that no state will "deprive" any person of "property" without "due process of law." U.S. Const. amend. XIV. An *ex parte* prejudgment attachment of real estate does not deprive the owner of any possessory rights in his property. At most, it impairs the market value of the property during the brief interval between the *ex parte* attachment and the "expeditious" adversary hearing required by state law. If the owner

has no plans to sell the property or borrow upon it during that interval, the *ex parte* attachment has caused him no adverse consequence. If, during that interval, he wishes to realize the full market value of his property, he may replace the attachment with a bond.[1] Nevertheless, I can agree that the impaired market value, though temporary and remediable, is a sufficient "deprivation" to warrant some due process protection. I disagree, however, that due process requires more than Connecticut has provided, which includes (1) a demonstration of probable cause, (2) factual allegations, (3) evidence supported by oath, (4) a pre-attachment determination by a state court judge of the sufficiency of the probable cause showing, (5) a prompt post-attachment adversary hearing, (6) notice of the right to such a hearing, (7) appellate review of an adverse decision, and (8) double damages in the event suit is commenced without probable cause.

The Court finds these protections constitutionally deficient for lack of a pre-attachment adversary hearing. Reliance is placed on a line of Supreme Court cases dealing with prejudgment remedies. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). All of these case, however, are distinguishable from the pending case in a crucial respect: They involved prejudgment remedies that totally deprived the defendant of the possession, use, and enjoyment of his property. In *Sniadach*, the

1 If a request to replace the attachment with a bond were denied, it would be arguable that the statute has been unconstitutionally applied. But no such request was made or refused in this case.

defendant lost his wages, "a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340. In *Fuentes*, the defendants lost their personal property, which was seized and sold. In *Mitchell*, where an *ex parte* hearing was deemed sufficient, property was seized and sequestered. In *Di-Chem*, funds owed to the defendant were garnished, putting them "totally beyond use during the pendency of the litigation." 419 U.S. at 606. I see no basis to apply the same due process protections deemed necessary for these total deprivations of property to the relatively minor impairment of interests caused by an attachment of real estate. Though the impairment may be deemed a deprivation, it is one so slight as to require no more process than Connecticut has provided.[2]

The Court supports the equation between the total deprivations involved in the Supreme Court's prejudgment remedy cases and the minor impairment involved in this case by enlisting our recent decision in *United States v. Premises & Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1263 (2d Cir. 1989), where we said, "As a general rule, due process has been held to require notice and an opportunity to be heard prior to the deprivation of a property interest." But *Livonia*, which I

2 In *Fuentes v. Shevin*, 407 U.S. at 86, the Court observed, "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." Thus, the brief duration of the impairment in the market value of the property does not remove it from the category of "deprivation" entitled to due process protection, but surely the brevity of the impairment significantly affects the extent of process that is due. "[T]he length . . . of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing . . . ." *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. at 606.

joined, involved precisely the type of total deprivation that the Supreme Court cases on prejudgment remedies had involved: The Government's process, obtained *ex parte*, entitled it to seize the defendant's home. Requiring an adversary hearing before that type of deprivation is no authority for imposing the same procedure on an impairment of market value that will last but a few days and can very likely be removed at once in favor of a bond if circumstances warrant.

The private interest affected is the first of the three factors to be assessed in determining how much process is due. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). In *Sniadach* and its progeny the private interest was significant. In the pending case, it is far less significant and, for all that appears in the record, is entirely theoretical. There is no indication that the landowner sought to sell his property or borrow on it during the interval between the *ex parte* hearing and his opportunity for a prompt adversary hearing.

The Supreme Court has informed us that not every state sanctioned impairment in the marketability of real property must be preceded by an adversary hearing. *See Bartlett v. Williams*, 464 U.S. 801 (1983) (dismissing for want of a substantial federal question an appeal challenging Connecticut's lis pendens procedure, Conn. Gen. Stat. §§ 52-325, -325a, 325b, for lack of a pre-filing hearing). Though not entitled to the same deference due a decision reached after plenary consideration, *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979), the dismissal in *Bartlett* is a ruling on the merits and a binding precedent, *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). The case for allowing an *ex parte* lis pendens procedure may be somewhat stronger than the case for allowing *ex*

parte prejudgment attachments, but from the standpoint of the private interest adversely affected, the attachment and the lis pendens are indistinguishable, and both are far less significant than the total deprivations that occurred in the *Sniadach* line of cases.

Moreover, in *Di-Chem* the Supreme Court identified the defects of the Georgia garnishment procedure as lack of participation by a judicial officer, lack of notice to the defendant, and lack of opportunity for an "early hearing." 419 U.S. at 606. If the Court had shared the view of the panel majority in this case that due process requires an adversary hearing before any prejudgment remedy may issue, it could hardly have contented itself with pointing out the lack of an "early hearing."

Judge Pratt, but not Judge Mahoney nor myself, finds the Connecticut statute additionally deficient because damages for wrongful attachment are not secured by a bond nor recoverable in the litigation in which the attachment was obtained. I agree with Judge Mahoney that Connecticut appears to allow a claim for wrongful commencement of litigation to be presented as a counterclaim in the main lawsuit. *See Sonnichsen v. Streeter*, 4 Conn. Cir. Ct. 659, 666-67, 239 A.2d 63, 67-69 (1967); *see also Hydro Air of Conn., Inc. v. Versa Technologies, Inc.*, 99 F.R.D. 111 (D. Conn. 1983) (applying Connecticut law). Even if state law required a separate lawsuit, I do not believe that the Constitution regulates state procedure to the extent of insisting that damages for wrongful attachment must be available in the underlying lawsuit rather than in a subsequent suit.

More fundamentally, however, I do not agree that a damage suit or a bond requirement is a constitutionally mandated component of a valid prejudgment remedy.

The bond requirement was urged by Justice Powell, speaking only for himself in his concurrence in *Di-Chem*. 419 U.S. at 611. We should be chary of concurrence jurisprudence. The Supreme Court has an obligation, especially when outlining new constitutional requirements,[3] to express a ruling that commands the support of a majority of the Court. The modern Court has considered various forms of prejudgment remedies on four occasions. It has found the procedures constitutionally deficient in *Sniadach*, *Fuentes*, and *Di-Chem*, and valid in *Mitchell*. None of these decisions holds that due process requires the attaching plaintiff to post a bond and respond in damages for wrongful attachment. Due process is the procedure constitutionally required for taking certain kinds of action; it is not a guaranty of damage remedies for wrongful action, much less of security for the recovery of such damages.

I must acknowledge that the Supreme Court's opinion in *Mitchell*, upholding the validity of a prejudgment sequestration remedy, contains favorable references to a damage action for wrongful issuance of a writ, 416 U.S. at 617, and to the plaintiff's obligation to post a bond to secure such damages, *id.* at 608. But I see no basis for translating these references into constitutional requirements. The damage remedy was mentioned only as a feature that "buttressed" the state's basic protection of providing judicial control of the entire sequestration process, *id.* at 617, and the bond requirement seems to be mentioned only in describing the overall system, *id.* at 608. I have no doubt that such features are meri-

3 In an earlier day, prejudgment remedies without a prior adversary hearing were routinely found to be constitutional. *See McKay v. McInne*, 279 U.S. 820 (1929) (per curiam); *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928); *Ownbey v. Morgan*, 256 U.S. 94 (1921).

torious. I do not believe, however, that the Supreme Court regards them as constitutional requirements.

Connecticut's procedure for prejudgment real estate attachments has been held to comport with due process requirements by a unanimous Connecticut Supreme Court, *see Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979) (Peters, J.), and by three judges of the District Court for the District of Connecticut, *see Shaumyan v. O'Neill*, 716 F. Supp. 65 (D. Conn. 1989) (Nevas, J.); *Pinsky v. Duncan*, 716 F. Supp. 58 (D. Conn. 1989) (Eginton, J.); *Read v. Jacksen*, Civ. No. B-85-85 (D. Conn. Feb. 18, 1988) (Zampano, J.). The opinions of now Chief Justice Peters in *Fermont* and of Judge Nevas in *Shaumyan* are particularly thoughtful and persuasive. Though in dissent, I am pleased to note my agreement with their views.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 201—August Term 1989

Argued: October 5, 1989 Decided: March 9, 1990

Petitions for Rehearing
Filed: March 22, 1990, March 23, 1990

Decided: April 25, 1990

Docket No. 89-7521

ROLAND PINSKY, JENNIE PINSKY, EILEEN FEDOWITZ and BRIAN K. DOEHR,

Plaintiffs-Appellants,

—against—

RICHARD K. DUNCAN, JOSEPH GOLDEN INSURANCE AGENCY, INC., and JOHN F. DI GIOVANNI,

Defendants,

RICHARD K. DUNCAN and JOHN F. DI GIOVANNI,

Defendants-Appellees,

STATE OF CONNECTICUT,

Intervenor.

Before:

NEWMAN, PRATT, and MAHONEY,
Circuit Judges.

Petitions for rehearing of appeal that declared unconstitutional, on due process grounds, Connecticut statute governing prejudgment attachment of real estate.

Granted in part and denied in part.

JOANNE S. FAULKNER, New Haven, CT, *for Plaintiff-Appellant Brian K. Doehr.*

ANDREW M. CALAMARI, Bronx, NY (Calamari & Calamari, of Counsel), *for Defendant-Appellee John F. Di Giovanni.*

HENRY S. COHN, Hartford, CT, Assistant Attorney General of the State of Connecticut (Clarine Nardi Riddle, Attorney General of the State of Connecticut, of Counsel), *for Intervenor.*

PRATT, *Circuit Judge*:

John F. Di Giovanni and the State of Connecticut have petitioned for rehearing of our decision in this appeal filed on March 9, 1990. The petitions are granted

only insofar as we amend our prior opinion to hold that, except for the present case, our declaration of the unconstitutionality of Conn. Gen. Stat. § 52-278e(a)(1) shall have prospective effect only, *i.e.*, shall be applicable only to attachments filed after March 9, 1990. The petitions are denied in all other respects.

In its petition, the State of Connecticut suggests that our decision is contrary to *McCahey v. L.P. Investors*, 774 F.2d 543 (2d Cir. 1985), a case not originally cited to us by any of the briefs of any party. While there is passing dictum in *McCahey* that might be interpreted as inconsistent with the panel majority's opinion, the point was not extensively considered there and we do not view *McCahey*'s holding as conflicting with our own.

The state also suggests that it was not given sufficient opportunity to intervene under 28 U.S.C. § 2403(b). Although the district court failed to notify the state of its right to intervene, we afforded it that opportunity on appeal. The state accepted the invitation, fully briefed the constitutional issues for us, and in doing so made no claim that it wished to reopen the trial record to present additional evidence. We are satisfied that its interests have been adequately protected.

Finally, in order to avoid ambiguity, the following references in the slip opinion to Conn. Gen. Stat. § 52-278e will be expanded in the final opinion to read § 52-278e(a)(1): page 2197, line 5; page 2202, line 12; page 2205, line 30; and page 2206, line 5.

So ordered.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

FILED
MAY 30 1990

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-ninth day of May, one thousand nine hundred and ninety.

ROLAND PINSKY, JENNIE PINSKY, EILEEN FEDOWITZ and BRIAN K. DOEHR,
Plaintiffs-Appellants,

— against — DOCKET NUMBER: 89-7521

RICHARD K. DUNCAN, JOSEPH GOLDEN INSURANCE AGENCY, INC., and JOHN F. DI GIOVANNI,
Defendants,

RICHARD K. DUNCAN and JOHN F. DI GIOVANNI,
Defendants-Appellees,

STATE OF CONNECTICUT,
Intervenor.

Petitions for rehearing containing suggestions that the actions be reheard in banc having been filed herein by counsels for the intervenor State of Connecticut and the defendant-appellee John F. Di Giovanni, and the panel that heard the appeal having granted in part and denied in part said petition for rehearing in an opinion filed on April 25, 1990,

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,

/s/ Tina Eve Brier
by: Tina Eve Brier,
Chief Deputy Clerk

United States Court of Appeals
FOR THE SECOND CIRCUIT

FILED
JUN 25 1990

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of June, one thousand nine hundred and ninety.

PRESENT:
HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges.

ROLAND PINSKY, JENNIE PINSKY, EILEEN FEDOWITZ and BRIAN K. DOEHR,
Plaintiffs-Appellants,

— against — No. 89-7521

RICHARD K. DUNCAN, JOSEPH GOLDEN INSURANCE AGENCY, INC. and JOHN F. DI GIOVANNI,
Defendants.

On motion of Joanne S. Faulkner, attorney for plaintiff-appellant Doehr, the first paragraph of the decision of this court, dated April 25, 1990, granting in part the petition for rehearing, is modified to read as follows:

> John F. Di Giovanni and the State of Connecticut have petitioned for rehearing of our decision in this appeal filed on March 9, 1990. The petitions are granted only insofar as we amend our prior opinion to hold that, except for the attachment in the present case and those attachments filed on or before March 9, 1990, the constitutionality of which was challenged in a lawsuit filed prior to March 9, 1990 and still pending on that date, our declaration of the unconstitutionality of Conn. Gen. Stat. § 52-278e(a)(1) shall have prospective effect only, *i.e.*, shall be applicable only to attachments filed after March 9, 1990. The petitions are denied in all other respects.

/s/ Jon O. Newman
/s/ George C. Pratt
/s/ J. Daniel Mahoney

[AMENDED OPINION]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 201 — August Term 1989

Argued: October 5, 1989 Decided: March 9, 1990

Petitions for Rehearing
Filed: March 22, 1990, March 23, 1990

Decided: April 25, 1990
Amended June 25, 1990

Docket No. 89-7521

ROLAND PINSKY, JENNIE PINSKY, EILEEN FEDOWITZ and BRIAN K. DOEHR,
Plaintiffs-Appellants,

— against —

RICHARD K. DUNCAN, JOSEPH GOLDEN INSURANCE AGENCY, INC., and JOHN F. DI GIOVANNI,
Defendants,

RICHARD K. DUNCAN and JOHN F. DI GIOVANNI,
Defendants-Appellees,

STATE OF CONNECTICUT,
Intervenor.

Before:

NEWMAN, PRATT, and MAHONEY,
Circuit Judges.

Petitions for rehearing of appeal that declared unconstitutional, on due process grounds, Connecticut statute governing prejudgment attachment of real estate.

Granted in part and denied in part.

JOANNE S. FAULKNER, New Haven, CT, *for Plaintiff-Appellant Brian K. Doehr.*

ANDREW M. CALAMARI, Bronx, NY (Calamari & Calamari, of Counsel), *for Defendant-Appellee John F. Di Giovanni.*

HENRY S. COHN, Hartford, CT, Assistant Attorney General of the State of Connecticut (Clarine Nardi Riddle, Attorney General of the State of Connecticut, of Counsel), *for Intervenor.*

PRATT, *Circuit Judge:*

John F. Di Giovanni and the State of Connecticut have petitioned for rehearing of our decision in this appeal filed on March 9, 1990. The petitions are granted only insofar as we amend our prior opinion to hold that, except for the attachment in the present case and those attachments filed on or before March 9, 1990, the constitutionality of which was challenged in a lawsuit filed prior to March 9, 1990 and still pending on that date, our declaration of the unconstitutionality of Conn. Gen. Stat. § 52-278e(a)(1) shall have prospective

effect only, *i.e.*, shall be applicable only to attachments filed after March 9, 1990. The petitions are denied in all other respects.

In its petition, the State of Connecticut suggests that our decision is contrary to *McCahey v. L.P. Investors*, 774 F.2d 543 (2d Cir. 1985), a case not originally cited to us by any of the briefs of any party. While there is passing dictum in *McCahey* that might be interpreted as inconsistent with the panel majority's opinion, the point was not extensively considered there and we do not view *McCahey*'s holding as conflicting with our own.

The state also suggests that it was not given sufficient opportunity to intervene under 28 U.S.C. § 2403(b). Although the district court failed to notify the state of its right to intervene, we afforded it that opportunity on appeal. The state accepted the invitation, fully briefed the constitutional issues for us, and in doing so made no claim that it wished to reopen the trial record to present additional evidence. We are satisfied that its interests have been adequately protected.

Finally, in order to avoid ambiguity, the following references in the slip opinion to Conn. Gen. Stat. § 52-278e will be expanded in the final opinion to read § 52-278e(a)(1): page 2197, line 5; page 2202, line 12; page 2205, line 30; and page 2206, line 5.

So ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED
FEB 17 9:06 AM '89

Roland Pinsky; Et al.

v. Civil No. N-88-339 (WWE)

Richard K. Duncan, Et al.

MEMORANDUM OF DECISION ON DEFENDANT JOHN F. DIGIOVANNI'S MOTION FOR SUMMARY JUDGMENT

In conjunction with several cases pending in the Connecticut Superior Court, each of the three defendants in this action secured an attachment of one of the plaintiffs' real property pursuant to Conn. Gen. Stat. Sec. 52-278e(a)(1). The plaintiffs claim that Section 52-278e(a)(1) is unconstitutional because it authorizes a plaintiff in a state court action to attach a defendant's real property without the filing of a bond and without prior notice and a hearing. They apparently make no claim that the statute was unconstitutional as applied in their particular cases.

On December 1, 1988, the Court granted defendant Joseph Golden Insurance Agency's motion for summary judgment after finding that Section 52-278e is constitutional. Presently pending is John F. DiGiovanni's motion for summary judgment which, like Joseph Golden Insurance Agency's motion, asserts the facial validity of Connecticut's prejudgment remedy statute. The Court considers this an opportunity to re-examine the merits of the plaintiffs' position. Upon reconsideration and for the reasons set forth below, defendant DiGiovanni's motion for summary judgment is GRANTED.

In relevant part, Conn. Gen. Stat. Sec. 52-278e provides:

> (a) The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and 52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for the attachment of real property. . . .

Upon examination of this statute, Judge Zampano recently noted:

> Review of the Connecticut statute reveals that it was drafted with the dictates of due process, as the Supreme Court has articulated them, in mind. *See* Conn. Gen. Stat. Sections 52-278e(a), 52-278e(c); *Fermont Div., Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 397 (1979) (section 52-278e exhibits all the saving characteristics that the law of procedural due process requires); *Sellner v. Beechwood Cons. Co.*, 176 Conn. 432, 434 (1979) (section 52-278e was "enacted in response to the constitutional instructions" of relevant United States Supreme Court precedent). The facial constitutional validity of Section 52-278e thus stands beyond question. . . .

Read v. Jacksen, Civil No. B-85-85, Ruling on Defendants' Motions for Summary Judgment, slip op. at 8 (D. Conn. February 19, 1988); *see also Shaumyan v. O'Neill*, Civil No. N-87-463, Ruling on Motions to Dismiss (D. Conn. June 21, 1988) (Nevas, J.) (instructing party mounting constitutional challenge to Section 52-278e(a)(1) to "fully address the implications of *Read*" in their summary judgment motions). Upon reconsideration of the plaintiffs' arguments, the Court continues to agree with Judge Zampano's suggestion that Section 52-278e(a)(1) is constitutional.

In a series of cases, none of which deals with the attachment of real property, the Supreme Court has provided guidance concerning the constitutionality of prejudgment remedy statutes. In *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969), the Supreme Court struck down a Wisconsin statute which authorized the prejudgment garnishment of wages without prior notice and hearing to the debtor. Noting that wages are "a specialized type of property presenting distinct problems in our economic system," the Court found that a statute under which a suing creditor could garnish wages without demonstrating a lien or prior interest in the property and without judicial supervision did not provide a debtor with sufficient procedural safeguards. *Id.* at 340.

Several years later, in *Fuentes v. Shevin*, 407 U.S. 67, (1972), the Supreme Court invalidated two replevin statutes which authorized a seller to repossess goods without judicial approval or participation. The Court noted that, absent extraordinary circumstances, a debtor must be notified and given the opportunity to contest a creditor's claim before his property may be subject to "outright seizure." *Id.* at 91.

By contrast, in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), the Supreme Court upheld the constitutionality of Louisiana's sequestration statute. Despite the fact that the statute did not provide notice and hearing before the sequestration of property, the Court found that it contained other procedural safeguards including: (1) the necessity of filing a detailed affidavit with the writ; (2) the posting of an adequate creditor's bond; (3) the return of the property upon the debtor's posting of a bond; (4) an immediate post-deprivation hearing; (5) creditor's liability for wrongful attachment; and, (6) judicial supervision of the entire process. *Id.* at 608–610.

Finally, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), the Supreme Court invalidated a Georgia statute which permitted the garnishment of a business' bank account without prior notice or hearing. Unlike the statute in *Mitchell*, the Georgia statute did not require, *inter alia*:

(1) the filing of a detailed affidavit made upon personal knowledge of the facts: (2) a writ issued by a judge; or (3) a prompt post-garnishment hearing at which the creditor would be required to demonstrate probable cause for the garnishment. *Id.* at 607.

The gravamen of the plaintiff's argument is that the Connecticut statute is deficient because it does not provide every procedural protection to which the Supreme Court has referred in these four cases. However, as these cases clearly suggest, Section 52-278e need not provide every procedural safeguard to survive constitutional scrutiny. A defendant need only be provided an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Accordingly, the Court may consider factors such as the length or severity of a deprivation of use or possession, when determining whether Connecticut's procedure, "as a whole," sufficiently protects a real property owner's rights. *See North Georgia Finishing*, 419 U.S. at 606; *Mitchell*, 416 U.S. at 610.

Viewed as a whole, Section 52-278e(1)(a) comports with due process. The statute provides for judicial supervision of the process in that it requires the prejudgment remedy to be issued by a judge. It "can be invoked only by a verified affidavit that contains factual, rather than merely conclusory, supporting allegations." *Fermont*, 178 Conn. at 397; *see* Conn. Gen. Stat. Sec. 52-278c(a)(2). A defendant whose property has been attached can require the plaintiff to show probable cause to sustain the prejudgment remedy in a prompt post-seizure hearing. *See* Conn. Gen. Stat. Sec. 52-278e(c) (Court shall hear such motion "expeditiously.") Where property rights are involved, the failure to provide a pretermination hearing ordinarily " 'is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate'." *Mitchell*, 416 U.S. at 611. Here, the existence of an opportunity to challenge the prejudgment seizure in a prompt manner is adequate because "[t]he defendant is neither deprived of the use or enjoyment of the

property pending a trial on the merits nor is his livelihood threatened by the deprivation of the right to freely transfer the realty." *Black Watch Farms, Inc. v. Dick*, 323 F.Supp. 100, 102 (D. Conn. 1971). The temporary and minor prehearing impairment of a defendant's property, when coupled with the purpose served by such an attachment, suggests that the fact that the statute does not provide for the filing of a bond prior to the attachment is unobjectionable. *See Cordoba Shipping Co., Ltd. v. Maro Shipping Ltd.*, 494 F.Supp. 183, 186 (D. Conn. 1980) ("'The general purpose of such an attachment is to secure the appearance of the defendant and to furnish security for any judgment plaintiff may receive.")

The motion for summary judgment is GRANTED.

SO ORDERED.

Dated at Bridgeport, Connecticut, this 16th day of February, 1989.

/s/ Warren W. Eginton

WARREN W. EGINTON, U.S.D.J.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROLAND PINSKY, et al

v. CIVIL NO. N-88-339 (WWE)

RICHARD K. DUNCAN,
JOHN F. DIGIOVANNI

FEB 21 3:54 PM '89

JUDGMENT

This cause came on for consideration on the defendants' motions for summary judgment by the Honorable Warren W. Eginton, United States District Judge, and

The Court having considered the motions and all the papers submitted in connection therewith filed its Memorandum of Decision on Defendant John F. DiGiovanni's Motion For Summary Judgment granting defendant DiGiovanni's motion and further ruled for the reasons set forth in the Court's memorandum of decision on defendant DiGiovanni's motion the defendant Duncan's motion for summary judgment is granted and ordered the clerk to remove this action from the docket of the Court,

It is therefore ORDERED and ADJUDGED that judgment be and is hereby entered for the defendants and the case is removed from the docket of this court.

Dated at Bridgeport, Connecticut this 21st day of February, 1989.

KEVIN F. ROWE, Clerk

By /s/ Carol E. Cannady

Carol E. Cannady
Deputy in Charge

RETURN DATE: APRIL 19, 1988 | SUPERIOR COURT

JOHN F. DI GIOVANNI | JUDICIAL DISTRICT OF NEW HAVEN

VS. | AT MERIDEN

BRIAN K. DOEHR | MARCH 15, 1988

APPLICATION

The undersigned represents:

1. That JOHN F. DI GIOVANNI of 273 Byron Road, South Meriden, Connecticut is about to commence an action against BRIAN K. DOEHR of 53 Woodland Street, Meriden, Connecticut pursuant to the attached proposed unsigned writ, summons, complaint and affidavit.

2. That there is probable cause that a judgment will be rendered in such matter in favor of the applicant and to secure such judgment the applicant seeks an order from this court directing that the following prejudgment remedy be issued to secure the sum of $75,000.00.

To attach the following described real property of the defendant, Brian K. Doehr, located in the City of Meriden and further described as follows:

As described on Schedule A attached hereto and made a part hereof.

3. The prejudgment remedy request is for an attachment of real property.

JOHN F. DI GIOVANNI

[illegible]
MAR 17 1988

BY: /s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
HIS ATTORNEY

order issued

RETURN DATE: APRIL 19, 1988 | SUPERIOR COURT

JOHN F. DI GIOVANNI | JUDICIAL DISTRICT OF NEW HAVEN

VS. | AT MERIDEN

BRIAN K. DOEHR | MARCH 16, 1988

AFFIDAVIT

STATE OF CONNECTICUT)
) ss. At Meriden
COUNTY OF NEW HAVEN)

Personally appeared, John F. DiGiovanni, who being duly sworn, deposes and says:

1. I am thoroughly familiar with the facts contained in the unsigned complaint and in the application for prejudgment remedy in the above entitled matter, and the facts set forth in each are true to the best of my knowledge and belief.

2. On March 13, 1988 I was willfully, wantonly and maliciously assaulted by the defendant, Brian K. Doehr.

3. Said assault and battery broke my left wrist and further caused an ecchymosis to my right eye, as well as other injuries to my head, limbs and body.

4. My left arm is in a cast and I am restricted in my usual duties and I have further expended sums of money for medical care and treatment and I will be obliged to expend further sums in the future.

5. In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff.

/s/ John F. Di Giovanni

JOHN F. DI GIOVANNI, PLAINTIFF

On This this 16th day of March, 1988, before me, Joseph P. Patrucco, the undersigned officer, personally appeared, John F. DiGiovanni, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained, as his free act and deed.

/s/ Joseph P. Patrucco

COMMISSIONER OF THE
SUPERIOR COURT

RETURN DATE: APRIL 19, 1988 — SUPERIOR COURT

JOHN F. DI GIOVANNI — JUDICIAL DISTRICT OF NEW HAVEN

VS. — AT MERIDEN

BRIAN K. DOEHR — MARCH 16, 1988

ORDER FOR PREJUDGMENT REMEDY

Whereas, the plaintiff in the above entitled action has made application for a prejudgment remedy to attach real property of the defendant, and

Whereas, from an examination of the application, proposed complaint and accompanying affidavit, it is found that there is probable cause to sustain the validity of the plaintiff's claim, that the application should be granted ex parte because the prejudgment remedy requested is for an attachment of real property.

Now, therefore, it is hereby ordered that the plaintiff may attach to the value of $75,000.00 the following goods or estate of the defendant, BRIAN K. DOEHR, the real estate as described in Schedule A attached hereto.

Dated at Meriden, Connecticut this 17th day of March, 1988.

BY THE COUNT (,J.)

[signature illegible]
JUDGE.

RETURN DATE: APRIL 19, 1988 | SUPERIOR COURT

JOHN F. DI GIOVANNI | JUDICIAL DISTRICT OF NEW HAVEN

VS. | AT MERIDEN

BRIAN K. DOEHR | MARCH 15, 1988

To Any Proper Officer:

By Authority of the State of Connecticut, you are hereby commanded, in accordance with the accompanying order, to attach to the value of $75,000.00, the goods or estate of BRIAN K. DOEHR, of 53 Woodland Street, Meriden, Connecticut and summon him to appear before the Superior Court for the Judicial District of New Haven at Meriden on the 19th day of April, 1988, such appearance to be made by each of defendants or their attorney by filing a written statement of appearance with the Clerk of the Court on or before the second day following the return date, then and there to answer unto JOHN F. DI GIOVANNI of 273 Byron Road, South Meriden, Connecticut, in a civil action wherein the plaintiff complains and alleges as set forth in the accompanying complaint.

E. Drezak of 39 Butler Street, Meriden, conn. is recognized in the sum of $250.00 to prosecute, etc.

/s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
COMMISSIONER OF THE
SUPERIOR COURT

RETURN DATE: APRIL 19, 1988 | SUPERIOR COURT

JOHN F. DI GIOVANNI | JUDICIAL DISTRICT OF NEW HAVEN

VS. | AT MERIDEN

BRIAN K. DOEHR | MARCH 15, 1988

COMPLAINT

1. On March 13, 1988 the defendant assaulted the plaintiff and beat him with his fists.

2. Said assault and battery broke the plaintiff's left writ, and caused an ecchymosis to his right eye, as well as other injuries to my head, limbs and body.

3. The assault was willful, wanton and malicious.

4. As a result of said injuries the plaintiff has been and in the future will be obliged to expend sums of money for medical care and treatment, doctors, hospitals, x-rays, physio therapy, medical appliances and medicines.

5. As a further result of said injuries the plaintiff has been and will be restricted in his usual activities.

The Plaintiff Claims Damages.

PLAINTIFF

BY: /s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
HIS ATTORNEY

AMOUNT IN DEMANT

The amount, legal interest or property in demand is not less than $15,000.00 exclusive or interest and costs.

SCHEDULE A

All that certain piece or parcel of land, with all buildings and improvements thereon, known as No. 53 Woodland Street and situtated in the City of Meriden County of New Haven and State of Connecticut, bounded and described as follows:

NORTH: by land now or formerly of Caroline Treiber, 120 feet;

EAST: by land now or formerly of Meriden, Waterbury & Connecticut River Railroad, 54', 9";

SOUTH: by land now or formerly of Frank Klein, 95 feet;

WEST: by Woodland Street, 50 feet.

RETURN DATE: APRIL 19, 1988 — SUPERIOR COURT

JOHN F. DI GIOVANNI — JUDICIAL DISTRICT OF NEW HAVEN

VS. — AT MERIDEN

BRIAN K. DOEHR — MARCH 15, 1988

NOTICE TO DEFENDANT

You have rights specified in the Connecticut General Statutes, including Chapter 903 a, which you may wish to exercise concerning this prejudgment remedy. These rights include: (1) The right to a hearing to object to the prejudgment remedy for lack of probable cause to sustain the claim; (2) The right to a hearing to request that the prejudgment remedy be modified, vacated or dismissed or that a bond be substituted; and (3) the right to a hearing as to any portion of the property attached which you claim is exempt from execution.

THE PLAINTIFF

BY: /s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
HIS ATTORNEY

CHAPTER 903a

PREJUDGMENT REMEDIES

Sec. 52-278a. Definitions. The following terms, as used in sections 52-278a to 52-278g, inclusive, shall have the following meanings, unless a different meaning is clearly indicated from the context:

(a) "Commercial transaction" means a transaction which is not a consumer transaction.

(b) "Consumer transaction" means a transaction in which a natural person obligates himself to pay for goods sold or leased, services rendered or moneys loaned for personal, family or household purposes.

(c) "Person" means and includes individuals, partnerships, associations and corporations.

(d) "Prejudgment remedy" means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment but shall not include a temporary restraining order.

(e) "Property" means any present or future interest in real or personal property, goods, chattels or choses in action, whether such is vested or contingent.

Sec. 52-278b. Prejudgment remedies, requirements; exception, waiver in commercial transaction. Notwithstanding any provision of the general statutes to the contrary, no prejudgment remedy shall be available to a person in any action at law or equity unless he has complied with the provisions of sections 52-278a to 52-278g, inclusive, except an action upon a commercial transaction wherein the defendant has executed a waiver as provided in section 52-278f.

Sec. 52-278c. Documents required. Forms. Hearing. Temporary restraining order. Entry fee. Service on defendant. (a) Except as provided in sections 52-278e and 52-278f, any person desiring to secure a prejudgment remedy shall attach his proposed unsigned writ, summons and complaint to the following documents:

(1) An application, directed to the superior court to which the action is made returnable, for the prejudgment remedy requested;

(2) An affidavit is sworn to by the plaintiff or any competent affiant setting forth a statement of facts sufficient to show that there is probable cause that judgment will be rendered in the matter in favor of the plaintiff;

(3) A form of order that a hearing be held before the court or a judge thereof to determine whether or not the prejudgment remedy requested should be granted and that notice of such hearing be given to the defendant;

(4) A form of summons directed to a proper officer commanding him to serve upon the defendant at least four days prior to the date of the hearing, pursuant to the law pertaining to the manner of service of civil process, the application, a true and attested copy of the writ, summons and complaint, such affidavit and the order and notice of hearing;

(b) The application, order and summons shall be substantially in the form following:

APPLICATION FOR PREJUDGMENT REMEDY

To the Superior Court for the judicial district of . . .

The undersigned represents:

1. That . . . is about to commence an action against . . . of . . . (give name and address of defendant) pursuant to the attached proposed unsigned Writ, Summons, Complaint and Affidavit.

2. That there is probable cause that a judgment will be rendered in the matter in favor of the applicant and to secure the judgment the applicant seeks an order from this court directing that the following prejudgment remedy be issued to secure the sum of $. . . .:

a. To attach sufficient property of the defendant to secure such sum:

b. To garnishee . . . ., as he is the agent, trustee, debtor of the defendant and has concealed in his possession property of the defendant and is indebted to him.

c. (Other Type of Prejudgment Remedy Requested.)

Name of Applicant
By. . . .
His Attorney

ORDER

The above application having been presented to the court, it is hereby ordered, that a hearing be held thereon on . . . . at . . . . a.m. and that the plaintiff give notice to the defendant of the pendency of the application and of the time when it will be heard by causing a true and attested copy of the application, the proposed unsigned writ, summons, complaint, affidavit and of this order to be served upon the defendant by some proper officer or indifferent person on or before . . . ., and that due return of service be made to this court.

Dated at Hartford this . . . . day of . . . ., 19. . .

Clerk of the Court

SUMMONS

To the sheriff of the county of . . . ., his deputy, or either constable of the town of . . . ., in said county,

Greeting:

By authority of the state of Connecticut, you are hereby commanded to serve a true and attested copy of the above application, unsigned proposed writ, summons, complaint, affidavit and order upon . . . ., of . . . ., by leaving the same in his hands or at his usual place of abode on or before . . . .

Hereof fail not but due service and return make.

Dated at . . . . this . . . . day of . . . . 19. . .

Commissioner of the Superior Court

(c) The clerk upon receipt of all such documents in duplicate, if he finds them to be in proper form, shall fix a date for the hearing on the application and sign the order of hearing and notice except that if the application includes a request for a temporary restraining order, the court or a judge of hearing and notice. The entry fee shall be then collected and the duplicate original document shall be placed in the court file.

(d) The clerk shall deliver to the applicant's attorney the original of the documents for service. Service having been made, the original documents shall be returned to the court with the endorsement by the officer of his actions.

Sec. 52-278d. Hearing on prejudgment remedy application. Determination by the court. Service of process. (a) The defendant shall have the right to appear and be heard at the hearing. The hearing shall be limited to a determination of whether or not there is probable cause to sustain the validity of the plaintiff's claim. If the court, upon consideration of the facts before it, finds that the plaintiff has shown probable cause to sustain the validity of his claim, then the prejudgment remedy applied for shall be granted as requested or as modified by the court unless the prejudgment remedy or application for such prejudgment remedy was dismissed or withdrawn pursuant to the provisions of section 52-278j.

(b) The clerk, upon the granting of the application for prejudgment remedy, shall deliver to the applicant's attorney the proposed writ, summons and complaint for service of process. If the court does not grant the application for any reason, including the failure of the plaintiff to serve the defendant, only a summons and complaint may be issued and served. In either event, the plaintiff may alter the return date of the writ, summons and complaint or the summons and complaint, as the case may be. No additional entry fee shall be collected upon the return of such action to court unless the prejudgment remedy or application for such prejudgment remedy was dismissed or withdrawn pursuant to the provisions of section 52-278j.

(c) If a prejudgment remedy is issued and the defendant moves the court for a stay, the court may, if it determines justice so requires, stay such order if the defendant posts a bond, with surety, in a sum determined by such judge to be sufficient to indemnify the adverse party for any damage which may accrue as a result of such stay.

Sec. 52-278e. Allowance of prejudgment remedy without hearing. Notice to defendant. Subsequent hearing and order. (a) The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and 52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property; or (2) that there is reasonable likelihood that the defendant (A) neither resides in nor maintains an office or place of business in this state and is not otherwise subject to jurisdiction over his person by the court, or (B) has hidden or will hide himself so that process cannot be served on him or (C) is about to remove himself or his property from this state or (D) is about to fraudulently dispose of or has fraudulently disposed of any of his property with intent to hinder, delay or defraud his

creditors or (E) has fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of his debts or (F) has stated he is insolvent or has stated he is unable to pay his debts as they mature.

(b) If a prejudgment remedy is granted pursuant to this section, the plaintiff shall include in the process served on the defendant the following notice prepared by the plaintiff: YOU HAVE RIGHTS SPECIFIED IN THE CONNECTICUT GENERAL STATUTES, INCLUDING CHAPTER 903a, WHICH YOU MAY WISH TO EXERCISE CONCERNING THIS PREJUDGMENT REMEDY. THESE RIGHTS INCLUDE (1) THE RIGHT TO A HEARING TO OBJECT TO THE PREJUDGMENT REMEDY FOR LACK OF PROBABLE CAUSE TO SUSTAIN THE CLAIM; (2) THE RIGHT TO A HEARING TO REQUEST THAT THE PREJUDGMENT REMEDY BE MODIFIED, VACATED OR DISMISSED OR THAT A BOND BE SUBSTITUTED; AND (3) THE RIGHT TO A HEARING AS TO ANY PORTION OF THE PROPERTY ATTACHED WHICH YOU CLAIM IS EXEMPT FROM EXECUTION.

(c) The defendant appearing in such action may move to dissolve or modify the prejudgment remedy granted pursuant to this section in which event the court shall proceed to hear and determine such motion expeditiously. If the court determines at such hearing requested by the defendant that there is probable cause to sustain the validity of the plaintiff's claim, then the prejudgment remedy granted shall remain in effect. If the court determines there is no such probable cause, the prejudgment remedy shall be dissolved. An order shall be issued by the court setting forth the action it has taken.

Sec. 52-278f. Effect of waiver of notice and hearing in commercial transactions. In an action upon a commercial transaction, as defined in section 52-278a, wherein the defendant has waived his right to a notice and hearing under

sections 52-278a to 52-278g, inclusive, the attorney for the plaintiff shall issue the writ for a prejudgment remedy without securing a court order provided that the complaint shall set forth a copy of the waiver.

Sec. 52-278g. Motion to preserve existing prejudgment remedies. A plaintiff who has secured a prejudgment remedy prior to May 30, 1973, may make a motion to the court in which such action is pending for a hearing as set forth in section 52-278d with notice thereof to the defendant or his attorney. If the court, upon consideration of the facts before it, finds that the plaintiff has shown probable cause to sustain the validity of his claim, such prejudgment remedy secured shall be effective from the date of such hearing and an order to that effect shall be issued by the court. Any such prejudgment remedy which is not perfected on or before October 1, 1977, shall be void and of no effect.

Sec. 52-278h. Application for prejudgment remedy filed by the plaintiff. The provisions of this chapter shall apply to any application for prejudgment remedy filed by the plaintiff at any time after the institution of the action, and the forms and procedures provided therein shall be adapted accordingly.

Sec. 52-278i. (Formerly Sec. 52-282). Order for prejudgment remedy on set-off or counterclaim. Any defendant in any civil action, upon filing a set-off or counterclaim containing a claim for money damages, may, at any time during the pendency of such action, apply in writing to the court before which such action is pending, or, when such court is not in session, to any judge thereof, for an order for a prejudgment remedy against the estate of the party or parties against whom such claim has been made. Such application shall be substantially in the form provided by subsection (b) of section 52-278c, adapted accordingly. A hearing on such motion

shall be held in accordance with the provisions of section 52-278d, adapted accordingly, and if the court, upon consideration of the facts before it, finds that the defendant has shown probable cause to sustain the validity of his claim, then the prejudgment remedy applied for shall be granted as requested or as modified by the court and the court shall issue such an order, directed to any proper officer, stating the amount and estate to be attached and the time of return, which order shall be served and returned in the same manner as an original writ of attachment, and when returned shall become a part of the files and records in the action. The estate attached shall be held to respond to the final judgment in the same manner as if it had been attached in an action originally brought for the recovery of the amount claimed in such set-off or counterclaim. The provisions of section 52-278e, except subparagraphs (A) and (B) of subdivision (2) thereof, and sections 52-278f and 52-278g, adapted accordingly, shall apply to any application for a prejudgment remedy sought under this section.

Sec. 52-278j. Dismissal or withdrawal of prejudgment remedy. (a) If an application for a prejudgment remedy is granted but the plaintiff, within ninety days thereof, does not serve and return to court the writ, summons and complaint for which the prejudgment remedy was allowed, the court on its own motion or on the motion of any interested party may dismiss the prejudgment remedy.

(b) If an application for a prejudgment remedy is denied and the plaintiff, within ninety days thereof, does not serve and return to court the writ of summons and complaint for which the prejudgment remedy was requested, or if a date for a hearing upon a prejudgment remedy is scheduled by the clerk and such hearing is not commenced within ninety days thereof, except as provided in section 52-278e, the court on its own motion may order the application to be considered as having been withdrawn.

(c) An application for a prejudgment remedy or a prejudgment remedy which is granted but not served may be withdrawn in the same manner as a civil cause of action.

Sec. 52-278k. Modification of prejudgment remedy. The court may, upon any application for prejudgment remedy under sections 52-278c, 52-278e, 52-278h or 52-282, modify the prejudgment remedy requested as may be warranted by the circumstances, and may, upon motion and after hearing, at any time modify or vacate any prejudgment remedy heretofore granted upon the presentation of evidence which would have justified such court in modifying or denying such prejudgment remedy at an initial hearing thereunder.

Sec. 52-2781. Appeal. (a) An order (1) granting or denying a prejudgment remedy following a hearing under section 52-278d or (2) granting or denying a motion to dissolve or modify a prejudgment remedy under section 52-278e or (3) granting or denying a motion to preserve an existing prejudgment remedy under section 52-278g shall be deemed a final judgment for purposes of appeal.

(b) No such appeal shall be taken except within seven days of the rendering of the order from which the appeal is to be taken.

(c) No such order shall be stayed by the taking of an appeal except upon the order of the judge who made such order, and any such stay shall be granted only if the party taking the appeal posts a bond, with surety, in a sum determined by such judge to be sufficient to indemnify the adverse party for any damages which may accrue as a result of such stay.

(d) If a motion to discharge such prejudgment remedy is brought by the defendant, the property affected by such remedy may be restored to the use of the defendant, if the

defendant posts a bond with surety in an amount determined by such judge to be sufficient to indemnify the plaintiff for any damages which may accrue by the defendant's continued use of such property, until such time as such motion is decided.

Sec. 52-278m. When personal service not required. Whenever a prejudgment remedy is sought under the provisions of sections 52-278h or 52-278i against a party who has previously filed a general appearance in such action, personal service of any application or order upon such party shall not be required, unless ordered by the court, but any such application or order may be served in the same manner as any motion in such action.

Sec. 52-278n. Motion to disclose property. Order for disclosure. Substitution of surety. (a) The court may, on motion of a party, order an appearing defendant to disclose property in which he has an interest or debts owing to him sufficient to satisfy a prejudgment remedy. The existence, location and extent of the defendant's interest in such property or debts shall be subject to disclosure. The form and terms of disclosure shall be determined by the court.

(b) A motion to disclose pursuant to this section may be made by attaching it to the application for a prejudgment remedy or may be made at any time after the filing of the application.

(c) The court may order disclosure at any time prior to final judgment after it has determined that the party filing the motion for disclosure has, pursuant to section 52-278d, 52-278e or 52-278i, probable cause sufficient for the issuance of a prejudgment remedy.

(d) A defendant, in lieu of disclosing assets pursuant to subsection (a) of this section, may move the court for substitution either of a bond with surety substantially in compliance with sections 52-307 and 52-308, or of other sufficient security.

(e) Rules of court shall be enacted to carry out the foregoing provisions and may provide for reasonable sanctions to enforce orders issued pursuant to this section.

(2)

No. 90-143

In The

Supreme Court of the United States

STATE OF CONNECTICUT
JOHN F. DI GIOVANNI,

Petitioners,

v.

BRIAN K. DOEHR,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

By: JOANNE S. FAULKNER
123 Avon Street
New Haven CT 06511
(203) 772-0395

Attorney for Respondent
Brian K. Doehr

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the court below correctly ruled that a state court defendant is deprived of due process when his real estate is attached *ex parte* (without prior notice and opportunity to be heard), when there are no extraordinary circumstances requiring special protection to a state or creditor interest, and without the safeguard of a bond to protect against wrongful attachment, pursuant to the established state procedure of Conn. Gen. Stat. §52-278e(a)(1).

REASONS FOR NOT GRANTING THE WRIT

I. THE CASE IS INSIGNIFICANT

This case does not raise an issue of general importance because (a) the challenged subsection of Connecticut's prejudgment remedy statute is peculiar to Connecticut; and (b) the right to notice and an opportunity to be heard before deprivation of a property interest, in the absence of exigent circumstances, is indisputable.

Connecticut's statute is unique in allowing a prejudgment attachment without prior notice and opportunity to be heard, solely because the defendant owns real estate. Subsection 52-278e(a)(1) does not require a showing that the plaintiff has a preexisting interest in the property (lis pendens, mechanic's lien, or security interest), or that there are extraordinary circumstances which justify dispensing with advance notice (need to obtain in rem jurisdiction; fraudulent transfer).

Connecticut's peculiar provision raises only a local question, not one of general importance. The provision is also contrary to the unanimous and longstanding position of this Court, that when a deprivation is foreseeable, and it is possible to provide prior notice and hearing, the State must do so. E.g., *Zinermon v. Burch*, 110 S.Ct. 975, 990 (majority), 995-96 (dissent) (1990); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *Parratt v. Taylor*, 451 U.S. 527, 537-38 (1981); *Board of Regents v. Roth*, 408 U.S. 564, 569-70 and note 7 (1972).

The decision below is thus sound and unexceptionable. It breaks no new ground which this Court need address.

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Petitioners claim that decisions of the Third, Fourth (three judge district court), Fifth and Ninth Circuit Courts of Appeals conflict with the decision below. On the contrary, those courts all agree with the court below, that where a foreseeable deprivation occurs pursuant to an established state procedure, a predeprivation hearing is the norm. E.g., *Hicks v. Feeney*, 850 F.2d 152, 154 (3d Cir. 1988); *Fields v. Durham*, 856 F.2d 655, 657 (4th Cir. 1988), vacated on other grounds and remanded in light of *Zinermon*, 58 U.S. L. Week 3564 (1990); *Turner v. Colonial Finance Corp.*, 467 F.2d 202 (5th Cir. 1972) (invalidating a replevin statute because it did not provide for advance notice/opportunity to be heard); *Haygood v. Younger*, 769 F.2d 1350, 1356 (9th Cir. 1985) (en banc), cert. den. 478 U.S. 1020 (1986); *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1380-82 (9th Cir. 1989).

The earlier cases cited by petitioners do not conflict with the decision below; those cases concern significantly different statutes which have the protections found lacking in Connecticut's.

For instance, *Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505 (9th Cir. 1975), concerns a statute unlike Connecticut's. The Washington statute minimized the risk of wrongful attachment by requiring the attaching plaintiff to post a double bond, Wash. Rev. Code (former) § 7.12.060; (current) ch. 6.25; and allowed an *ex parte*

attachment only in extraordinary circumstances. V Martindale-Hubbell Law Directory 1973, Wash. Law Digest *Attachments*; VI *Id.* 1975; VIII *Id.* 1989.

In 1975, the Ninth Circuit based its *Chehalis* ruling on a perception that a real estate attachment does not deprive the defendant of a constitutionally protected interest. Contra, *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85 (1988); Cf. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). The Ninth Circuit no longer adheres to that early view. Cf. *Stone v. Godbehere*, 894 F.2d 1131, 1134 (9th Cir. 1990) ("A restraining order prohibiting the alienation of property does impose a significant injury.").

Hutchinson v. Bank of North Carolina, 392 F.Supp. 888 (M.D.N.C. 1975), considered a statute which, unlike Connecticut's, allowed *ex parte* attachments only in extraordinary circumstances, and required a plaintiff's bond. The three-judge court emphasized that the constitutionality of the statute was based on its limit to narrow and exceptional circumstances. *Hutchinson* does not conflict with the decision below.

Similarly, *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123 (3d Cir. 1976), is consistent with the decision below. The court invalidated a statute which allowed an *ex parte* attachment only in extraordinary circumstances: against a nonresident, for jurisdictional purposes. The court, at p. 1130, noted the centrality of the bond requirement to a constitutionally valid statute.

Finally, petitioners cite dicta in a footnote of *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978). That case held an *ex parte* prejudgment attachment statute

unconstitutional even though it was limited to extraordinary circumstances and required a bond, again, unlike the Connecticut provision at issue.

None of the cases cited by petitioners as conflicting with the decision below considered a statute like Connecticut's, which does not limit *ex parte* attachments to extraordinary circumstances and which does not mandate a bond to protect the defendant. The cases do not conflict with the decision below; they are consistent with it.

III. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THE CONNECTICUT SUPREME COURT

The Connecticut Supreme Court has never considered whether the subsection at issue violates due process. Accordingly, the decision of the Second Circuit Court of Appeals does not conflict with any decision of the Connecticut Supreme Court.

In *Fermont Division v. Smith*, 178 Conn. 393, 395 (1975), the court had a different subsection before it, § 52-278e(a)(2), which requires an allegation of extraordinary circumstances for an *ex parte* attachment. In *Kukanskis v. Griffith*, 180 Conn. 501 (1980), the court held that an *ex parte* release of an e(a)(1) attachment was harmless error because the original *ex parte* attachment had been improperly based on a conclusory affidavit.

One cannot, as do petitioners, presume that the Connecticut Supreme Court decided issues raised herein, but not raised or involved in the cases cited by petitioners. Cf. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979).

In *Kukanskis, supra*, at 509, the Connecticut Supreme court recognized the absence of a bond as a due process defect, as it also did in *Roundhouse Constr. Corp. v. Telesco Masons Supplies Co.*, 168 Conn. 371, 385 (1975), thus agreeing with the majority opinion below.

Both *Kukanskis* and *Roundhouse* recognized the property owner's right to be heard at a meaningful time and in a meaningful manner. The analysis of the Connecticut Supreme Court in those decisions suggests that, if it were to decide the same issues as decided by the court below, it would reach the same result.

Since the Connecticut Supreme Court has not addressed or decided the issue before the Second Circuit, there can be no conflict.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

JOANNE S. FAULKNER
123 Avon Street
New Haven, Connecticut 06511
(203) 772-0395
Attorney for Respondent

No. 90-143

In The
Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DIGIOVANNI,
Petitioners,

v.

BRIAN K. DOEHR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

Petitioners

State of Connecticut:

BY: CLARINE NARDI RIDDLE
ATTORNEY GENERAL OF THE
STATE OF CONNECTICUT
ARNOLD B. FEIGIN
CAROLYN K. QUERIJERO
HENRY S. COHN*
Assistant Attorneys General
P.O. Box 120
Hartford, CT 06101
(203) 566-4990

John F. DiGiovanni:

BY: ANDREW M. CALAMARI
2429 Hering Avenue
Bronx, NY 10469
(212) 655-3636

*Counsel of Record

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No. 90-143

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DIGIOVANNI,
Petitioners,

v.

BRIAN K. DOEHR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

1. DECISIONS OF THE SUPREME COURT OF CONNECTICUT CONFLICT WITH THE SECOND CIRCUIT'S RULING IN THIS CASE.

Petitioners argue in their Petition that a conflict exists between the case under review, *Pinsky v. Duncan*, 898 F.2d 852 (2d Cir. 1990), and decisions of the Connecticut Supreme Court. They also argue that conflicts exist between *Pinsky* and decisions of other Courts of Appeals. Respondent claims that these conflicts do not exist. Respondent's position is untenable.

Despite respondent's denials (Brief in Opposition, pp. 4–5), the Connecticut Supreme Court has upheld the constitutionality of real estate attachments in Connecticut under Conn. Gen. Stat. § 52-278e, thereby creating a conflict with the Second Circuit's ruling in the present case.

In *Fermont Div. Dynamics Corp. of America v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979) the Connecticut Supreme Court found the *entire* statutory section constitutional, not just one or two subsections. This point was made by Chief Judge Burns in *Armstrong Cumming Architects v. Gruen*, Civ. No. B88-680 (EBB) (D.Conn. July 17, 1989)[1] as follows:

> Significantly, the *[Fermont]* court found all of § 52-278e constitutional, not just the one subsection directly before the court. The court expressly held that "[s]ection 52-278e exhibits all the saving characteristics that the law of procedural due process requires."

Id. at 7. *See also Shaumyan v. O'Neill*, 716 F.Supp. 65, 74 (D.Conn. 1989) (Judge Nevas).

In addition, all federal and state judges to consider the point have held that *Fermont* did, in fact, uphold the provision on real estate attachments contained in Conn. Gen. Stat. § 52-278e. Judge Newman so states in his dissent in the Second Circuit in the case at issue. 898 F.2d at 864–5, App. 31A.[2]

The Connecticut Supreme Court followed the *Fermont* holding in *Kukanskis v. Griffith*, 180 Conn. 501, 430 A.2d 21 (1980), a case arising under Conn. Gen. Stat. § 52-278e(a)(1). In *Glanz v. Testa*, 200 Conn. 406, 408, 409, 511 A.2d 341 (1986), a real estate attachment case, Justice Shea explains the *Fermont* holding's procedural safeguards:

> Under the General Statutes § 52-278e, the Court may award a prejudgment remedy, without a hearing or notice to the defendant, upon verification by oath of the plaintiff or some competent affiant that there is probable cause to sustain the validity of the plaintiff's claim. "The statute can be invoked only by a verified affidavit that contains factual, rather than merely conclusory, supporting allegations." *Fermont Division v. Smith*, 178 Conn. 393, 397, 423 A.2d 80 (1979); *see Kukanskis v. Griffith*, 180 Conn. 501, 505, 430 A.2d 21 (1980). Under this ex parte prejudgment remedy procedure, the court must make a determination of probable cause based solely on the facts contained in the affidavit before granting the attachment. In order to comport with federal constitutional due process requirements; *Fermont Division v. Smith*, supra, 397–98; the statute guarantees the defendant the opportunity for an immediate post-seizure hearing at which the prejudgment remedy will be dissolved unless the court determines "that there is probable cause to sustain the validity of the plaintiff's claim." General Statutes § 52-278e.

Clearly the *Glanz* court applied *Fermont* in the context of the constitutionality of § 52-278e(a)(1).

Of the utmost importance is the fact that Connecticut *Superior* Court Judges concluded that *Fermont* upheld § 52-278e(a)(1), making that statute constitutional in Connecticut even *after* the Second Circuit's contrary ruling in the present case. *See Soden v. Johnson*, D.N. CV83-0067730S (Stamford-Norwalk Sup. Ct., March 26, 1990) and *The Chase Manhattan Bank, N.A. v. Shea*, D.N. CV89-010397S (Stamford-Norwalk Sup. Ct., March 27, 1990) which held that

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[1] A copy of this opinion is set forth in the appendix to this reply brief. On April 9, 1990, Chief Judge Burns granted summary judgment for the debtor on the merits in this matter. She also vacated the attachment, citing the *Pinsky* decision, then binding on the District Court.

[2] "App." refers to the Appendix to the Petition for Certiorari.

Fermont had found § 52-278e(a)(1) constitutional and further that the Connecticut trial courts were bound by the Connecticut Supreme Court's ruling in *Fermont*, not by the Second Circuit's ruling in *Pinsky*.[3]

In this instance where the Second Circuit is effectively overruling a decision of the Connecticut Supreme Court, review in the Supreme Court appears essential. This review is another aspect of Federal Court deference to the enforcement of the orders and judgments of state courts found critical in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987); *see also Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977). ("[Abstention] stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory.")

2. A CONFLICT EXISTS BETWEEN THE SECOND CIRCUIT'S RULING IN THE PRESENT CASE AND DECISIONS OF OTHER CIRCUITS.

Petitioners assert in their petition that a conflict exists between the Second Circuit opinion and decisions of other Circuits. Respondent has not shown otherwise. *Jonnet v. Sav. Bank of the City of New York*, 530 F.2d 1123 (3d Cir. 1976) sets forth at 1129 the requirements for constitutional *ex parte* attachments which virtually duplicate the Connecticut law.[4] The Court held the "extraordinary circumstances" of foreign attachment were not controlling. *Id.* 530 F.2d at 1123, n.13. Respondent's citation to *Hicks v. Feeney*, 850 F.2d 152 (3d Cir. 1988), a civil rights case involving wrongful commitment, where a discovery ruling was reviewed by the court, has no relevance to real estate attachments.

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[3] These opinions are set forth in the appendix to this reply brief.

[4] *Jonnet, supra*, 1130, mandates protection of the debtor by "bond or *otherwise*." As both the concurring Judge and dissenting Judge explained in *Pinsky*, the plaintiff's bond requirement is satisfied in Connecticut by the availability of a double damage action for vexatious litigation under Conn. Gen. Stat. § 52-568(a). 898 F.2d at 860, 864, App. 23A, 29A.

The Three-Judge Court in *Hutchinson v. Bank of North Carolina*, 392 F.Supp. 888 (M.D.N.C. 1975) upheld the constitutionality of the North Carolina *ex parte* real estate attachment statute, specifically noting that the "extraordinary circumstances" set forth in the statute were not the basis of its holding, 392 F.Supp. at 895, n.8. Respondent cites in reply *Fields v. Durham*, 856 F.2d 655 (4th Cir. 1988), an employment case not in point, in which a pre-termination hearing was not required.

The Fifth Circuit's holding in *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526 (5th Cir. 1978), conflicts with the Second Circuit's ruling. The *Johnson* Court struck down a Georgia attachment statute which failed to satisfy due process, but in doing so it set forth as a remedy each of the "saving characteristics" found in the Connecticut statute. The existence of an "extraordinary situation" was an *additional* means to protect the debtor, but was not mandated, if other safeguards were present. *Id.* at 535, n.16. Respondent's citation of an earlier Fifth Circuit case, *Turner v. Colonial Finance Corp.*, 467 F.2d 202 (5th Cir. 1972), a replevin case governed by *Fuentes v. Shevin*, 407 U.S. 67 (1972), hardly proves that there is no conflict between the rule of *Johnson* and the Second Circuit regarding real estate attachments.

Finally the Ninth Circuit in *Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505 (9th Cir. 1975) correctly sustained an *ex parte* real estate attachment, and this holding has not been abandoned in subsequent cases. Indeed *Chehalis* was recently relied upon to affirm a real estate attachment absent extraordinary circumstances in *Pay'n Save v. Eads*, 53 Wash. App. 443, 767 P.2d 592, 596 (1989). Respondent's cases involving disciplining prisoners, *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985), revoking a daycare license, *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375 (9th Cir. 1989), and barring transfer of property, *Stone v. Godbehere*, 894 F.2d 1131 (9th Cir. 1990) do not affect the *Chehalis* holding. *Stone* itself *sustains* an order without notice to the husband barring transfer of marital property, relying on *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

In short, respondent attempts to press upon this Court a simplistic view of the due process clause, relying as he does upon a variety of cases having no relevance to real estate attachments. The issues herein, to paraphrase Justice White in *Mitchell v. W.T. Grant Co., supra*, at 539, 540, are not "so clear as [respondent] would have it." In light of the conflicts between the Connecticut Supreme Court and the Second Circuit and between other Circuits and the Second Circuit, a writ of certiorari should be granted to review this facial attack on the Connecticut real estate attachment statute.

CONCLUSION

Petitioners respectfully submit that the Petition should be granted and a writ of certiorari should issue to review the judgment and opinion of the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted.

Petitioner
STATE OF CONNECTICUT:

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

ARNOLD B. FEIGIN
Assistant Attorney General

CAROLYN K. QUERIJERO
Assistant Attorney General

HENRY S. COHN
Counsel of Record
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, Connecticut 06101
(203) 566-4990

Petitioner
JOHN F. DIGIOVANNI:

ANDREW M. CALAMARI, ESQ.
2429 Hering Avenue
Bronx, New York 10469
(212) 655-3636

No. 90-143

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DIGIOVANNI,
Petitioners,

v.

BRIAN K. DOEHR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO
REPLY BRIEF OF PETITIONERS

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ARMSTRONG CUMMING ARCHITECTS Plaintiff	:	
	:	CIVIL NO.
v.	:	B88-680 (EBB)
	:	
MICHAEL S. GRUEN Defendant	:	

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this diversity action, plaintiff Armstrong Cumming Architects ["ACA"], a New York firm, seeks to recover fees stemming from services rendered to defendant Gruen for the redesign and remodeling of his home in Darien, Connecticut. ACA initially filed suit in state court, where it obtained a prejudgment remedy in the form of an attachment on Gruen's property.

Gruen removed the matter to this court, and now seeks to have the complaint dismissed in its entirety or a dismissal of plaintiff's second, third, and fourth affirmative defenses, based on his claim that plaintiff is not licensed to practice architecture in Connecticut. Defendant also seeks a vacatur of the attachment. contending that Connecticut's prejudgment remedy statute is unconstitutional. In the alternative, he seeks a reduction in the attachment because he disputes the amount that plaintiff claims is due.

Although the motion is captioned as a motion to dismiss, defendant notes in his affidavit that the motion is one for summary judgment, accompanied as it is by several exhibits. "If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule

56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(b), Fed. R. Civ. P.

LICENSURE

The parties agree that, as a firm, ACA is not licensed to practice architecture in Connecticut and that, as an individual, Cumming, a partner of ACA, is not licensed in Connecticut. The other partner of ACA, Armstrong, is so licensed. The plaintiff in this action is ACA, "a firm of architects and a general partnership." Complaint ¶ 1 (Nov. 2, 1988). Defendant argues that absent such a license, plaintiff's attempt to recover fees either on the contract or in quantum meruit is barred by Connecticut law. *See, e.g., Lapuk v. Blount*, 2 Conn. Cir. 271 (Conn. Cir. Ct. 1964); *Douglas v. Smulski*, 20 Conn. Supp. 236 (Ct. Com. Pl. 1957).

Plaintiff claims that it falls within one of three statutory exemptions from Connecticut's architectural licensing requirements. Plaintiff places reliance on the following provisions.

> The follow activities are exempted from the provisions of this chapter:
>
> (b) the construction or alteration of a residential building to provide dwelling space for not more than two families . . .;
>
> (d) the activities of employees of architects licensed in this state acting under the instructions, control or supervision of their employers;
>
> (h) the making of plans and specifications for or supervising the erection of any building containing less than five thousand square feet total area; the making of plans and specifications for or supervising the erection of any addition containing less than five thousand square feet total area to any building; the making of alterations to any existing buildings containing less than five thousand square feet total area; provided this subsection shall not be construed to exempt from the operation of the other provisions of this chapter alterations in buildings of more than five thousand square feet total area, involving the safety or stability of such buildings.

Conn. Gen. Stat. Ann. § 20-298 (1958 & Supp. 1989).

The court is unpersuaded that subsection (b) or (h) provides a basis for a license exemption in this case. Subsection (b) specifically exempts "construction or alteration," a phrase that plaintiff construes to include the drawing of designs. Plaintiff argues that "plans for a dwelling for two families or less do not have to be drawn by a licensed architect." Plaintiff's Response at 3 (Mar. 6, 1989). Defendant argues, and the court concurs, that this subsection refers to the *activity* of construction and alteration, not the designs necessary for such activity. "Had the legislature intended to include the latter activity within the meaning of § 20-298(b), it would have included words to that effect, just as it did in subdivision (c) ('the preparation of details and shop drawings') and subdivision (h) ('the making of plans and specifications')." Motion to Dismiss at 6 (Jan. 30, 1989). Indeed, unless subsection (b) is read as defendant suggests, there is no meaningful way to read it in conjunction with subsection (h), which provides limited exemptions for plans and specifications involving areas of less than five thousand square feet. It seems clear that drawing the plans necessary to alter a residence for two families or less where the alterations involve less than five thousand square feet does not require an architectural license. Conn. Gen. Stat. Ann. § 20-298(h). Plans for alterations in such a facility involving an area of more than five thousand square feet or, if the facility itself is greater than this size but the alterations are to a space less than five thousand square feet and they involve the "safety or stability" of the building, do require an architectural

license. *Id.* The court concludes, therefore, that the intent of subsection (b) is that, regardless of the size of the alteration, the entity actually performing construction or alterations need not be licensed as an architect.

Plaintiff's reliance on Conn. Gen. Stat. Ann. § 29-263 is unavailing. This provision merely imposes a requirement that *any* construction or alteration of a building requires a permit from the local building official, whose responsibilities are "to determine their compliance with the requirements of the state building code and, where applicable, the local fire marshal shall review such plans to determine their compliance the state fire safety code." *Id.* (1958 & Supp. 1989). The existence of a mandatory review process does not lead, as plaintiff argues, to the conclusion that an architect's license is unnecessary to draw the plans for constructing or altering a dwelling for two families or less. Indeed, based on the clear requirements contained in Conn. Gen. Stat. Ann. § 20-298(h), if the residence exceeds five thousand square feet, an architectural license would be required.

Plaintiff points out that the definition of the "practice of architecture" does not mention building activities. *See* Conn. Gen. Stat. Ann. § 20-288(3).[1] This definition strongly supports the defendant. As defined, the practice of architecture does not include the activity of construction or alteration, which dovetails with Conn. Gen. Stat. Ann. § 20-298(b). Subsection (b) provides that an architectural license is unnecessary for such activity. Moreover, the agreement submitted by ACA purporting to cover the relationship between ACA and Gruen does not indicate that ACA will be

[1] The statute provides that "[t]he 'practice of architecture' means rendering or offering to render of service by consultation, investigation, evaluations, preliminary studies, plans, specifications and coordination of structural factors concerning the aesthetic or structural design and contract administration of building construction or any other service in connection with the designing or contract administration of building construction located within the boundaries of this state . . . ." Conn. Gen. Stat. Ann. § 20-288(3) (1958 & Supp. 1989).

performing construction or alterations. *See* Plaintiff's Response (Mar. 6, 1989) (letter from Armstrong to Gruen, dated Jun. 30, 1987).

Subsection (d) may afford plaintiff some measure of protection from having its case dismissed. Based on the record as it currently exists, it is unclear in what capacity Cumming acted at the Gruen site.[2] The record contains no insights from Armstrong on this issue and neither side has offered legal authority on the question of whether a partner can be an employee of the partnership for limited purposes. This dispute is enough to defeat a summary judgment ruling at this point.

PREJUDGMENT REMEDY

Defendant makes a facial attack on the constitutionality of Connecticut's prejudgment remedy statute. *See* Conn. Gen. Stat. Ann. § 52-278a *et seq.* The alleged deficiencies include: (1) that the statute allows for an ex parte attachment of real estate without requiring prior notice and a hearing to the record owner; and (2) an ex parte attachment of real estate can occur without the movant posting a bond and there is no provision for the payment of attorney's fees. The court finds neither argument persuasive. Analysis of the prejudgment statute requires that the court look at the statute as a whole. Contrary to defendant's arguments, there is no mandatory checklist of procedural requirements, the absence of which renders the law unconstitutional on its fact.

The due process clause of the fourteenth amendment does not require predeprivation notice and a hearing, provided certain procedural safeguards exist. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 607, 610, 616–17 (1974). In that case, examples included judicial review of a sworn, factual submission before

[2] Cumming's affidavit is not signed, dated, or sworn to under oath and, therefore, it does not comply with Rule 56(e). It cannot serve as the basis for denying summary judgment.

a prejudgment order will issue, the opportunity for the debtor to post a bond as a substitute for the prejudgment order, and the right to an immediate postdeprivation hearing at which the creditor carries the burden of establishing grounds for the prejudgment remedy. *Id.* at 616–18. Under Connecticut law,

> in testing whether a [prejudgment remedy] procedure complies with the requirements of due process it will be examined in its entirety, and the lack of a provision for a prior hearing in and of itself will not be constitutionally fatal if other saving characteristics are present.

Roundhouse Constr. Corp. v. Telesco Masons Supplies Co., 168 Conn. 371, 380, *vacated*, 423 U.S. 809 (1975) (remanded to consider whether court's judgment based on state or federal constitutional grounds, or both), *aff'd on remand*, 170 Conn. 155 (earlier decision based on both federal and state constitutional grounds), *cert. denied*, 429 U.S. 889 (1976). When viewed in its entirety, it is clear that safeguards protect those subject to ex parte prejudgment remedies. The absence of a predeprivation hearing and the lack of a requirement of a bond are not facial infirmities in the statute. Defendant's claim that he enjoys a constitutional right to attorney's fees is unavailing.

Connecticut's Supreme Court ruled on the constitutionality of Conn. Gen. Stat. § 52-278e (governing ex parte attachments) in *Fermont Div. v. Smith*, 178 Conn. 393 (1979). Significantly, the court found all of § 52-278e constitutional, not just the one subsection directly before the court. The court expressly held that "[s]ection 52-278e exhibits all the saving characteristics that the law of procedural due process requires." *Id.* at 397–98. *See also Shaumyan v. O'Neill*, Civil No. N-87-463(AHN), slip op. at 40 (D. Conn. Jun. 27, 1989) ("the court concludes that section 52-278e(a)(1) [governing ex parte attachments of real estate], as written, comports with the requirements of fourteenth amendment due process."); *Pinsky v. Duncan*, Civil No. N-88-339(WWE), slip op. at 5 (D. Conn. Feb. 16, 1988) ("Viewed as a whole, [s]ection 52-278e(a)(1) comports with due process."); *Read v. Jacksen*, Civil No. B-85-85(RCZ), slip op. at 8 (D. Conn. Feb. 18, 1988) ("The facial constitutional validity of § 52-278e . . . stands beyond question . . . ."). This court joins the chorus in holding that Conn. Gen. Stat. § 52-278e is not facially unconstitutional.

Defendant also argues that plaintiff did not comply with the statute when it obtained the attachment on his property. Specifically, he challenges the affidavit presented to the judge issuing the prejudgment order. The statute requires that the party seeking an attachment, "upon verification by oath . . . of some competent affiant, [establish] that there is probable cause to sustain the validity of plaintiff's claim . . . ." Conn. Gen. Stat. § 52-278e(a). Here, Armstrong submitted an affidavit limited to a factual recitation of the events underlying the suit. *See* Defendant's Exhibit A. That plaintiff submitted no writing evidencing an alleged oral contract or that it did not discuss whether plaintiff was licensed does not detract from the probable cause determination in this case. The "specific factual showing of the nature of the claim," required by the statute, *see Kukanskis v. Griffith*, 180 Conn. 501, 505 (1980), exists in Armstrong's affidavit.

ATTACHMENT AMOUNT

Having held that the prejudgment remedy is not unconstitutional brings the court to defendant's challenge to the attachment amount in this case. He contends that the record will not support an attachment in the $30,000 to $40,000 range because the invoices yet to be honored by him only total $17,130.09. A letter from Armstrong, dated May 11, 1988, substantiates this claim. *See* Defendant's Reply Affidavit Exhibit I (Mar. 26, 1989). Neither this letter nor actual copies of the invoices were presented to the state court judge who originally entered the prejudgment remedy. This court agrees with the issuing judge with respect to the probable cause

determination but cannot agree, based on the record as it now exists, that the attachment amount is appropriate. Accordingly, the court orders that the attachment immediately be amended on the land records to reflect the $17,130.09 that the parties agree is due and outstanding. Any additional amounts that plaintiff seeks to recover clearly are open to dispute and are best left to a jury's determination.

CONCLUSION

The record must be more fully developed before the court can determine whether Conn. Gen. Stat. Ann. § 20-298(d) provides an exemption for the plaintiff's activities underlying this suit. The court holds that § 20-298 (b) and (h) do not provide licensing exemptions for the plaintiff based on the facts of this case. Accordingly, and upon the basis of a fuller record, plaintiff must show that it enjoys a legal and factual entitlement to the architectural licensing exemption contained in § 20-298(d) or its case will be dismissed. Connecticut's prejudgment remedy statute is not unconstitutional and, therefore, a vacatur of the attachment against the defendant's property is not appropriate. A reduction in the amount of the attachment based on the record as developed is appropriate, however, and such is ordered. The attachment shall be reduced to $17,130.09.

SO ORDERED.

/s/ Ellen B. Burns
ELLEN BREE BURNS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven, Connecticut,
this 17th day of July, 1989.

D.N. CV83 0067730S

JOHN V. SODEN

V.

ROBERT E. JOHNSON, ET AL.

. . . . . .

D.N. CV89 0105334S

GREENWICH TILE

V.

MALLOY

. . . . . .

D.N. CV 89 0103308S

BARNETT BANK

V.

GABOR J. MERTL, ET AL.

. . . . . .

D.N. CV89 010533S

GREENWICH TILE

V.

MALLOY DEVELOPMENT

. . . . . .

D.N. CV89 0102621S

NEW CANAAN FOREIGN CAR

V.

G. BARRETT MONTGOMERY

SUPERIOR COURT

JUDICIAL DISTRICT
OF STAMFORD/
NORWALK
AT STAMFORD

MARCH 26, 1990

MEMORANDUM OF DECISION
RE: MOTION TO DISSOLVE EXISTING
PREJUDGMENT REAL ESTATE ATTACHMENTS

This memorandum of decision addresses issues raised in motions filed by various defendants with this court to dissolve prejudgment attachments issued against their real estate. The attachments had been obtained *ex parte*, pursuant to Conn. Gen. Stat. § 52-278e. Section 52-278e has subsequently and very recently been declared to be unconstitutional on its face by the Second Circuit Court of Appeals. The Second Circuit's opinion, announced in *Pinsky v. Duncan*, No. 89-7521 (2nd Cir. March 9, 1990), found that Connecticut's *ex parte* prejudgment real estate attachment statute was unconstitutional on its face in that it deprived a defendant of his right to a hearing prior to issuance of the attachment in violation of the due process clause of the 14th Amendment to the United States Constitution. Not surprisingly, the *Pinsky* decision has generated a great deal of controversy about the continued validity of existing prejudgment real estate attachments, and has given rise to a flurry of motions to dissolve such attachments. This memorandum will address such motions generally.

At the outset, this court acknowledges that it is bound by the decisional law of our Supreme Court. However, the court also recognizes that the *Pinsky* decision has the potential to create chaos within the state's business and legal communities. Therefore, the issues raised by the *Pinsky* decision in the motions before this court should be addressed.

While decisions of federal courts passing on federal constitutional questions should be afforded due respect by the state courts, the federal courts exercise no appellate court jurisdiction over state courts. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970); *People v. Brisbon*, 129 Ill. 2d 200, 544 N.E. 2d 297, 135 Ill. Dec. 801 (Ill. 1989). Until the United States Supreme Court has spoken, state courts are not

precluded from exercising their own judgments on federal constitutional questions. *United States ex rel. Lawrence v. Woods*, 432 F.2d at 1075, quoting the Supreme Court of Iowa in *Iowa Nat'l. Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445, 454 (1930).

Our Supreme Court has spoken on the question of the constitutionality of Conn. Gen. Stat. § 52-278e and has determined that the statute meets the due process standards of the state and federal constitutions. *Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 397, 423 A.2d 80 (1979). Consequently, at this point in the process of judicial review of § 52-278e, this trial court is bound by the Connecticut Supreme Court's finding of constitutionality in *Fermont*. The opinions of the Supreme Court of Connecticut are binding upon the Superior Court and...until the court's decisions are changed, the Superior Court is bound to follow them. *Monies v. Hartford Hospital*, 26 Conn. Sup. 441, 442-43 (1966). Accordingly, as to the motions before this court which seek to vacate or dissolve existing prejudgment real estate attachments on the grounds of the Second Circuit Court of Appeals ruling in *Pinsky*, the motions are denied under *Fermont*.

However, even if this court were not bound by *Fermont*, and were to follow the *Pinsky* ruling, the question of whether *Pinsky* should be applied retroactively to invalidate all existing real estate attachments obtained through *ex parte* orders would still remain to be determined. In the interest of eliminating the speculation and uncertainty attendant to this issue, the following discussion is provided.

The United States Supreme Court considered the question of nonretroactive application of judicial decisions within a civil context in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.E. 2d 296, 92 S. Ct 349 (1971). In *Chevron*, the court identified the three factors to be weighed in each case to determine whether a judicial decision should be applied retroactively or prospectively. *Id.* at 106. First, the decision must establish a new principle of law, either by overturning clear past precedent or by deciding an issue of first impression. *Id.* Second, the court must determine whether

retrospective application of the new rule will further or retard its operation in each case. *Id.* at 107. Finally, if retroactive application of the court's decision could produce substantial inequitable results, there is ample basis for avoiding the hardship by a holding of nonretroactivity. *Id.* at 107.

Turning to the issue raised here by retroactive application of the *Pinsky* ruling, namely the continued validity of existing *ex parte* real estate attachments obtained pursuant to § 52-278e, the court concludes the new rule would be applied prospectively only.

A weighing of the merits and demerits of retroactive application of the *Pinsky* rule to existing *ex parte* real estate attachments in Connecticut demonstrates that substantial inequitable results may occur if *Pinsky* is not limited to prospective force. The decision clearly overturns past legal precedents in this state and renders unlawful statutory procedures upon which Connecticut litigants have reasonably relied. Retroactive operation of the decision will not further the operation of the rule. On the contrary, retroactive application of *Pinsky* would create hardship and injustice to creditors who have lawfully obtained attachments to secure their interests. The disruptive effect of summary dissolution of existing real estate attachments would be far-reaching and potentially devastating to an orderly business community. Issues relating to the validity of title to real estate and priority of secured interests would be implicated.

For the foregoing reasons, this court would follow the reasoning of the Supreme Courts of Massachusetts and Rhode Island, as well as the District Court of Massachusetts when, upon invalidating similar prejudgment real estate attachment statutes, those courts expressly held their decisions to have prospective application only. *See Marran v. Gorman*, 359 A.2d 694 (1976); *Bay State Harness Horse Racing and Breeding Ass'n. v. PPG Industries, Inc.*,

365 F. Supp. 1299 (D. Mass. 1973); *McIntyre v. Associates Financial Services Co.*, Mass., 328 N.E. 2d 492 (1975).

/s/
CIOFFI, J.

Decision entered in accordance with the foregoing dated this 26th day of March, 1990.

John Morrow
Chief Clerk

All counsel notified. J. M.

D.N. CV89 010397 S (SUPERIOR COURT

THE CHASE MANHATTAN BANK, N.A. (STAMFORD-NORWALK (JUDICIAL DISTRICT

V. (AT STAMFORD

STEPHANIE W. SHEA (MARCH 27, 1990

MEMORANDUM OF DECISION

The plaintiff bank claims that the defendant Stephanie Shea defrauded it out of some $9,000,000 in connection with loans to several sulphur trading companies of which the defendant was president.

The action began when the plaintiff successfully obtained an *ex parte* attachment of Mrs. Shea's real estate in Darien. The defendant immediately moved to vacate the attachment; General Statutes § 52-278e(c); denying that she had committed any fraud on the plaintiff and claiming that Chase knew precisely what it was doing when it made the loans to the companies in question.

From the onset of the hearing to vacate the attachment, the defendant maintained that our Connecticut *ex parte* real estate attachment law violated the due process clause of the Fourteenth Amendment to the United States Constitution, and furthermore, that she has not been afforded "the immediate hearing" referred to in our statute.

Over the course of the last several months, a number of witnesses have testified as the plaintiff seeks to prove probable cause that it will prevail on the merits, thus warranting a continuation of the attachment. Counsel advise that in order to complete the hearing, only one deposition is required, as well as the completion of the testimony of a Michael Morgan, an expert witness called by the defendant.

The defendant now moves that the attachment be vacated immediately because of the decision of the United States Court of Appeals for the Second Circuit in *Pinsky v. Duncan*, No. 89-7521 (March 9, 1990).

The plaintiff argues that this court is not bound by the *Pinsky* decision and cites a number of cases to that effect. I concur completely and add some relatively recent cases not referred to by plaintiff, all of which stand for the proposition that, unlike the United States Supreme Court, other federal courts are not in the appellate process with respect to state judiciaries. Examples of these recent cases are: *People v. Dale*, 545 N.E. 2d 521, 537 (Ill. App. 1 Dist. 1989); *People v. DelVecchio*, 544 N.E. 2d 297 (1989); *Watson v. Symons Corp.*, 121 F.R.D. 351, 354 (N.D., Ill. 1988) (state courts need not apply the law of the federal district in which they sit on questions of federal law).

Although it is very clear that our courts are not bound by this decision of the federal appeals court, until and unless the Supreme Court affirms *Pinsky*, there is nevertheless a practical problem in that anyone against whom an *ex parte* real estate attachment is granted may go into the federal system and receive an order directing the attaching party to release the attachment. This would be a valid order because the federal court would have jurisdiction over each party, and its order would be binding on all other courts, subject only to the appellate process. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (1970). It may well be, therefore, that from a practical standpoint it makes more sense not to issue *ex parte* real estate attachments unless and until the United States Supreme Court reverses *Pinsky* or our Connecticut legislature changes our statute.

In any event, this issue need not be reached with respect to the pending motion to vacate the attachment on Mrs. Shea's home because I believe that the *Pinsky* decision is prospective only, not retroactive. The leading case on nonretroactivity is *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct.

349, 30 L.Ed. 2d 296 (1971). This decision states that before a decision can be deemed to be nonretrospective, three standards should be examined. The first is whether the decision reverses established law. This would certainly be true in this case because our attachment statute, Connecticut General Statute § 52-278e, was upheld in *Fermont Div. v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979).

The second criterion is "whether retrospective operation will further or retard its operation." *Chevron Oil*, 404 U.S. at 107. The third factor asks whether retrospective application of the decision "could produce substantial inequitable results." *Id.* Applying those standards to the Connecticut statute and *Pinsky*, it would seem clear that retrospective application of *Pinsky* will not further its operation. To the contrary, retroactive application could cause substantial, inequitable results by creating uncertainty within the Connecticut business community which has relied upon the lawfulness of the state's statutory procedures.

Based on the standards of *Chevron Oil*, I believe that the *Pinsky* decision is prospective only and hence I decline to grant the defendant's motion to vacate the attachment. Furthermore, the defendant is being afforded the very hearing that the *Pinsky* decision indicates the due process clause requires, a hearing in which the plaintiff has the burden of proving probable cause. Hence, the hearing should continue as planned.

SO ORDERED.

Dated at Stamford, Connecticut this twenty-seventh day of March 1990.

/s/ W.B. Lewis
LEWIS, J.

Decision entered in accordance with the foregoing
March 27, 1990.

[illegible], Asst. Clerk

All Counsel Notified March 27, 1990.

(3)

No. 90-143

In The

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DIGIOVANNI,

Petitioners,

v.

BRIAN K. DOEHR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE CONNECTICUT BANKERS ASSOCIATION AND THE SAVINGS BANKS' ASSOCIATION OF CONNECTICUT AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Allan B. Taylor
Counsel of Record
James J. Tancredi
Kirk D. Tavtigian, Jr.
Deborah S. Chang
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

Attorneys for the Connecticut Bankers Association and the Savings Banks' Association Of Connecticut

36 pp

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

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Hartford, CT 06103-3499
(203) 275-0100

Attorneys for the Connecticut Bankers Association and the Savings Banks' Association Of Connecticut

The Connecticut Bankers Association and the Savings Banks' Association of Connecticut respectfully move for leave to file the accompanying brief as amici curiae in this case. The consent of the Petitioners, the State of Connecticut and John F. DiGiovanni, has been filed with this motion. The Respondent, Brian K. Doehr, has refused to consent to the filing of the brief.

INTEREST OF THE AMICI CURIAE

Almost all Connecticut banks are members of either the Connecticut Bankers Association or the Savings Banks' Association of Connecticut. The Connecticut Bankers Association, formed in 1899, is comprised of 52 commercial banks, trust companies and other banking institutions in Connecticut. The Savings Banks' Association of Connecticut, formed in 1902, is comprised of 64 savings banks. The purpose of both associations is to contribute to a sound banking system in the State of Connecticut and to promote the general welfare and interests of their member banks. [1]

Due primarily to the economic downturn in Connecticut, particularly in the real estate market, the member banks of the Connecticut Bankers Association and the Savings Banks' Association of Connecticut have initiated and will continue to initiate litigation to collect hundreds of millions of dollars of loans in default. Accordingly, prejudgment security is important to and is frequently sought by Connecticut banks. While prejudgment security has always been important in the collection of unsecured loans, it now also is significant with respect to both commercial and residential real estate loans, because the decline in real estate values in Connecticut has caused loans which were fully secured when made to now be

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[1] A list of the member banks of the amici is listed at pp. 1A-4A of the Appendix ("App.") of Amici Curiae attached hereto.

undersecured. Prejudgment security is also significant today because the economic downturn in Connecticut has caused debtors to go to greater lengths than usual to dispute, attempt to avoid, or delay payment of their debts.

Banks' and other creditors' most efficient, effective and expeditious form of prejudgment security has been *ex parte* real estate attachments obtained pursuant to Conn. Gen. Stat. § 52-278e(a)(1), the statute invalidated by the Second Circuit in this case. Accordingly, the Second Circuit's opinion "has the potential to create chaos within the State's legal and business communities." *Soden v. Johnson*, No. CV 83-0067730-S, slip. op. at 3 (Stamford-Norwalk Superior Court, March 26, 1990) (reprinted in Appendix, *see* p. 6A). The amici will assist this Court by describing how the Second Circuit's decision will adversely impact: creditors' ability to collect judgments; the timely and efficient resolution of debtor/creditor disputes; and the cost and availability of loans in Connecticut. The amici will also address conflicts between the Second Circuit's decision and this Court's due process decisions as well as the inconsistent analytical approaches utilized by lower courts in the prejudgment remedy due process area. The State of Connecticut and John F. DiGiovanni have focused their petition on other issues.

For all the foregoing reasons, the Connecticut Bankers Association and the Savings Banks' Association of Connecticut respectfully move for leave to file the accompanying brief as amici curiae.

Respectfully submitted,

Allan B. Taylor
Counsel of Record
James J. Tancredi
Kirk D. Tavtigian, Jr.
Deborah S. Chang
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

Attorneys for the Connecticut Bankers Association and the Savings Banks' Association of Connecticut

August 1990

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Hartford, CT 06103-3499
(203) 275-0100

Attorneys for the Connecticut Bankers Association and the Savings Banks' Association Of Connecticut

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INTEREST OF THE AMICI CURIAE

The interest of the Connecticut Bankers Association and the Savings Banks' Association of Connecticut in this case is set forth in the accompanying Motion For Leave To File a Brief as Amici Curiae.

SUMMARY OF ARGUMENT

For over three hundred years Connecticut has allowed attachments to be made without prior notice or hearing. The current Connecticut prejudgment remedy statutes provide significant procedural and substantive protections against wrongful attachment. Connecticut's *ex parte* real estate attachment statute, Conn. Gen. Stat. § 52-278e(a)(1), allows *ex parte* attachments of real estate only if a judge finds probable cause based on a factual affidavit. Connecticut's prejudgment remedy statutes provide for an expeditious post-attachment hearing at the defendant's request, allow the defendant at anytime to substitute a bond or other property for the liened property, require that a defendant be given notice of these rights, and provide for immediate appellate rights. Under Connecticut law, the defendant also has a double damages cause of action for wrongful attachment.

Nevertheless, the Second Circuit, stating that attachment is an "extraordinary . . . remedy," held § 52-278e(a)(1) unconstitutional because it does not provide for prior notice and hearing. The Second Circuit's decision will substantially impair creditors' ability to recover judgments, timely and efficient resolution of debtor/creditor disputes, and the cost and availability of loans in Connecticut. Additionally, the decision is contrary to this Court's due process decisions, because the Connecticut prejudgment remedy statutes appropriately balance the rights of debtors and creditors. Finally, due to substantial inconsistencies in lower court decisions, this Court should accept certiorari to clarify the analytical approach to be used in prejudgment remedy due process cases.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION WILL SUBSTANTIALLY IMPAIR CREDITORS' ABILITY TO OBTAIN PREJUDGMENT SECURITY, THEREBY ADVERSELY AFFECTING TIMELY AND EFFICIENT RESOLUTION OF DEBTOR/CREDITOR DISPUTES AND THE COST AND AVAILABILITY OF LOANS IN CONNECTICUT.

As set forth more fully in the Motion for Leave to File Brief of the Amici Curiae, banks and other creditors have a substantial need to obtain prejudgment security. For many reasons, real estate attachments are the prejudgment security most sought by banks and other creditors in Connecticut. Real estate ownership is a matter of public record in Connecticut and, therefore, real estate owned by a defendant can expeditiously be located. Since a real estate attachment is accomplished by recording a certificate on land records, there is no cost (such as storage) to maintain the attachment during the litigation. The value of real estate, as opposed to personal property, typically does not substantially decline during the pendency of litigation. Also, real estate attachments facilitate resolution of debtor/creditor disputes, by insuring that a debtor cannot avoid a debt by disposing of assets.

Connecticut has authorized prejudgment remedies without prior hearing and notice for over three hundred years. 1 E. Stephenson, *Connecticut Civil Procedure*, § 38(e), at 148 (1970); P. Shuchman, *Prejudgment Attachments in Three Courts of Two States*, 27 Buff. L. Rev. 459, 461 (1978); (hereinafter "Shuchman"); Code of Connecticut *8 (1650); Conn. Gen. Stat. (Rev. 1702), p. 4; Conn. Gen. Stat. Tit. 19, ch. 2, § 3 (1875); *see Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 611-614 (1974). *Ex parte* real estate attachments are important because they prevent debtors from conveying, encumbering or otherwise alienating real estate prior to attachment. *See id.* at 416 U.S. at 609 ("[t]he danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may furnish a warning to the

debtor acting in bad faith."); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 610 (1975) (Powell, J., concurring) ("[g]arnishment and attachment remedies afford the judgment creditor a means of assuring, under appropriate circumstances, that the debtor will not remove from the jurisdiction, encumber or otherwise dispose of certain assets then available to satisfy the creditor's claim."); R. Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 Virginia L. Rev. 807, 847 (1975) (hereinafter "Scott"). *Ex parte* attachments are especially important now because of the current economic downturn in Connecticut, which has caused secured real estate loans to become undersecured, and which has resulted in debtors going to greater lengths than usual to avoid or delay payment of legitimate debts.

Inability to obtain *ex parte* prejudgment real estate attachments will increase the likelihood that creditors will be unable to obtain prejudgment security and satisfaction of judgments. As a result of increased write-offs of uncollectible loans, the cost of credit in Connecticut likely will increase and Connecticut lenders will be forced to require added safeguards, such as additional collateral or personal guarantees. *See, e.g.*, Scott, *supra*, at 810, 836-67. It is likely that these measures will result in decreased lending activity, which would be particularly harmful now, when economic activity and lending in Connecticut is already declining.

The Second Circuit did not consider the harmful "societal costs" of its decision, as it should have. *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976). Nor did it consider the probably minimal value of the additional safeguard of a prior hearing. *Zinermon v. Burch*, __U.S.__, 110 S.Ct. 975, 984 (1990). One 1978 statistical study of Connecticut's prejudgment remedy statutes concluded with respect to preattachment hearings that defendants infrequently appeared to contest attachments, and even when defendants did appear, their appearance had "little or no effect." Shuchman, *supra*, at 484; *see* Scott, *supra*, at 843, 848 (prior hearings are of minimal value).

The Second Circuit's opinion is already adversely affecting Connecticut's creditors and courts. Even though the Connecticut Supreme Court has upheld the constitutionality of § 52-278e(a)(1), *Kukanskis v. Griffith*, 180 Conn. 501, 430 A.2d 21 (1980); *Fermont Div., Dynamics Corp. of America v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979), Connecticut courts currently are not entertaining *ex parte* prejudgment real estate attachments absent exigent circumstances. As a result, hearings must be held prior to any prejudgment real estate attachments issuing, and in some state courts hearings are being delayed for months.[2] The time period between the filing of applications and scheduled hearings can only be expected to increase as the backlog in the state courts continues to grow. As a result, debtors will now have even greater opportunities to transfer or encumber their real estate prior to prejudgment remedy hearings.[3]

For all of the foregoing reasons, this Court should accept certiorari and reverse the Second Circuit's decision.

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[2] Accordingly, the substantial increase in the number of prejudgment remedy hearings and the accompanying backlog in state courts have already increased the state's "administrative burden" and resulted in other adverse "societal costs" as a result of the Second Circuit's decision. *Mathews v. Eldridge*, *supra*, 424 U.S. at 347.

[3] Section 52-278e(a)(1) *ex parte* prejudgment remedy applications are no longer being utilized by attorneys or accepted by Connecticut courts, because of the fear of retaliatory federal civil rights actions by debtors. Although the Second Circuit's decision is not binding on Connecticut state courts, *see, e.g., United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Circ. 1970) *cert. denied*, 402 U.S. 983 (1971); *People v. Brisbon*, 129 Ill. 2d 200, 544 N.E. 2d 297 (1986), *cert. denied*, __U.S.__, 110 S.Ct. 1796 (1990); *Soden v. Johnson*, No. CV 83-0067730-S, slip. op. at 3, (Stamford-Norwalk Sup. Ct., March 26, 1990) (App. at 6A); *Chase Manhattan Bank, N.A. v. Shea*, slip. op. at 1, n.1, No. CV 89-0102197-S (Stamford-Norwalk Sup. Ct., May 18, 1990) (reprinted in Appendix, *see* p. 10A), in effect, it has overruled the Connecticut Supreme Court's decisions in *Fermont* and *Kukanskis* upholding § 52-278e(a)(1). Since this places the Second Circuit in a role that the Constitution confers on this Court alone, this Court should accept certiorari.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DUE PROCESS CASES.

A. The Second Circuit Erred In Holding That Only Under Extraordinary Circumstances May A State Allow Attachment Of Real Estate Without Prior Notice And A Hearing.

The Second Circuit stated that this Court's decisions require prior notice and a hearing absent "extraordinary circumstances," which "must be truly unusual", such as the need 'to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, [or] to protect the public from misbranded drugs and contaminated food.'" *Pinsky v. Duncan*, 898 F.2d 852, 854, 855 (2d Cir. 1990)(quoting *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972)). This standard is contrary to numerous decisions of this Court approving property deprivations without notice and hearing and absent such "extraordinary circumstances". *See, e.g., Zinermon v. Burch*, __U.S.__, 110 S.Ct. 975, 984 (1990); *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 19 (1978) ("where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (hearing not required before corporal punishment of junior high school students); *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 619-620 (hearing not required before issuance of writ to sequester debtor's property); *Mathews v. Eldridge, supra*, 424 U.S. 319 (prior hearing unnecessary to terminate social security payments); *Barry v. Barchi*, 443 U.S. 55 (1979) (hearing not necessary prior to suspension of horsetrainer's license).

In *Mitchell*, this Court held that Louisiana's sequestration statutes comported with due process, even though they authorized complete deprivation of personal property without prior notice or

hearing, because: a sequestration order could only be issued by a judge based on an affidavit alleging specific facts; the debtor had an opportunity for an immediate hearing to seek dissolution of the order; the debtor could regain possession of the property by posting a bond; and the debtor had a damages remedy for wrongful sequestration. *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 607-619; *North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 606-07; *see Jonnet v. Dollar Sav. Bank of City of New York*, 530 F.2d 1123, 1127 (3d Cir. 1976).

This Court in *Mitchell* did not require "a national war effort" or similar extraordinary circumstances to hold that a predeprivation hearing was not constitutionally required. The *Mitchell* court made clear that with respect to prejudgment remedies prior notice and hearing typically were not required:

> The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931). . . .
>
> 'It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.' (quoting *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950)).
>
> More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors, without notice, hearing, or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit.' (quoting *Coffin Brothers & Co. v. Bennett*, 277 U.S. 29, 31 (1928)).

Mitchell v. W. T. Grant Co., supra, 416 U.S. at 611-613; *see North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 606 (noting that only an "early hearing" was required in connection with a prejudgment garnishment.); *Id.* at 611 (Powell, J., concurring) ("Pregarnishment notice and a prior hearing have not been constitutionally mandated in the past . . . Such restrictions, antithetical to the very purpose of the remedy, would leave little efficacy to the garnishment and attachment laws of the 50 States.")(footnote omitted.); *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 534 n. 16 (5th Cir. 1978); *McCahey v. L. P. Investors*, 774 F.2d 543, 548, (2d Cir. 1985) ("[w]hile some ambiguity exists, it is generally believed that prejudgment *ex parte* attachments are constitutional if issued by a neutral judicial officer on the basis of factual representations regarding the merit of the plaintiff's claim and immediately followed by notice to the defendant and by an opportunity to contest the seizure."); Note, *The Constitutionality of Real Estate Attachments*, 37 Washington & Lee L. Rev. 701, 710 (1980) (*Mitchell* and *North Georgia Finishing, Inc.* "dispens[ed] with the requirement of a prior hearing when the attachment statute provides for a prompt post-seizure hearing.")

The Connecticut statute in this case, like the Louisiana statute in *Mitchell*, provides for issuance of the order of attachment only by a judge based on a fact-specific affidavit, provides the debtor with the right to an immediate hearing to seek dissolution, and provides the debtor with a right to substitute a bond for the attachment. The Connecticut prejudgment remedy statutes also require that notice of these rights be served on the defendant, and provide for immediate appellate rights. Additionally, under Connecticut law, the debtor has a double damages remedy for a wrongful attachment. *See Pinsky v. Duncan, supra*, 898 F.2d at 860-61 (Mahoney, J., concurring). For the reasons set forth above, § 52-278e(a)(1) does not violate the due process clause.

B. Real Estate Attachment Pursuant To § 52-278e(a)(1) Is Not A Substantial Deprivation Of Property Requiring Prior Notice And A Hearing.

The degree and the possible length of wrongful deprivation are relevant in determining compliance with the due process clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982); *Memphis Light, Gas & Water Division v. Craft, supra*, 436 U.S. at 19; *Mathews v. Eldridge, supra*, 424 U.S. at 341. Although this Court has never held that a non-possessory attachment constitutes a substantial deprivation, the Second Circuit decided that a real estate attachment constituted a substantial deprivation because it could affect a landowner's ability to encumber or dispose of the property.

The Second Circuit failed to consider that a real estate attachment in no way interferes with the defendant's use or possession of the property. Unlike with other property, a defendant's "'livelihood [is not] threatened by the deprivation of the right to freely transfer the realty.'" *Pinsky v. Duncan*, 716 F. Supp. 58, 60 (D. Conn. 1989) (quoting *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100, 102 (D. Conn. 1971); *Williams v. Bartlett*, 189 Conn. 471, 479, 457 A.2d 290, 294, *appeal dismissed*, 464 U.S. 801 (1983). The court also did not consider that under the Connecticut prejudgment remedy statutes, the defendant has an unqualified right to offer a bond or other property in lieu of the property which has been attached. Conn. Gen. Stat. § 52-304.

The Second Circuit also failed to consider the potential length of the deprivation. Nowhere in its legal analysis does the court acknowledge that a defendant may immediately move to dissolve or modify the attachment, and that the trial court must then "proceed to hear and determine such motion expeditiously." Conn. Gen. Stat. § 52-278e(c).

For these reasons, an *ex-parte* real estate attachment pursuant to § 52-278e(a)(1) does not constitute a substantial deprivation of property requiring prior notice and a hearing.[4]

C. The Second Circuit Erroneously Determined That § 52-278e(a)(1) Poses A High Risk Of An Erroneous Deprivation.

The Second Circuit concluded that the risk of a wrongful attachment was considerable because § 52-278e(a)(1) is not limited to simple debtor/creditor disputes. *Pinsky v. Duncan, supra*, 898 F.2d at 856. In making this determination, the Court focused on the facts of the instant case, which involved an alleged assault and battery.

The Second Circuit erred by focusing on the specific facts of the instant case. Even though "credibility and veracity may be a factor . . . in some cases . . . procedural due process rules are shaped by the risk of error inherent in the truth-finding process applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge, supra*, 424 U.S. at 344. The Connecticut prejudgment remedy statutes in most instances are used by lenders litigating to collect loans in default. As the Second Circuit acknowledged in *Pinsky v. Duncan, supra*, 898 F.2d at 856, and as this Court has recognized, the risk of an erroneous deprivation is minimal in actions involving written loan documents. *Mathews v. Eldridge, supra*, 424 U.S. at 345; *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 609, 617, 618. Accordingly, even under the Second Circuit's analysis, in

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[4] The Second Circuit failed to consider that the respondent in this case never moved in state court to dissolve or modify the attachment. The respondent's action demonstrates that the deprivation caused by the real estate attachment in this case was slight. *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 610.

most cases, § 52-278e(a)(1) does not create a substantial risk of an erroneous deprivation.[5]

The Second Circuit also erred by ignoring the double damages remedy available to a defendant whose property has been wrongfully attached.[6] This is contrary to this Court's decision in *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 610, that a potential damages award minimizes the risk of an erroneous deprivation.

> [P]rior hearings might well be dispensed with in many circumstances in which the state's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law.

Ingraham v. Wright, supra, 430 U.S. at 679 n.47 (1977) (quoting Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405, 431 (1977)(footnote omitted)).

> [W]hen only an invasion of a property interest is involved, there is a greater likelihood that a damages award will make a person completely whole than when an invasion of the individual's interest in freedom from bodily restraint and punishment has occurred. In the property context, therefore, frequently a post-deprivation state remedy may be all the process that the Fourteenth Amendment requires.

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[5] The Second Circuit invalidated § 52-278e(a)(1) on its face. If the court was concerned about the specific application of § 52-278e(a)(1) in this case or its specific application outside of debtor/creditor disputes, it should not have invalidated the statute on its face.

[6] Although Judge Pratt did discuss this damages remedy in the portion of his decision which was not joined by the other panel members, in which he decided that a bond was constitutionally required, *Id.* at 857, the damages remedy was not discussed in Section B of Judge Pratt's decision, addressing prior notice and hearing.

Id. at 701 (Stevens, J., dissenting on other grounds)

The Second Circuit erred in deciding that the risk of an erroneous deprivation of property under § 52-278e(a)(1) was substantial.

D. The Second Circuit Ignored The State's Interest In Facilitating The Collection Of Debts In Order To Support The Flow Of Credit.

The Second Circuit decided that the state's interest in postponing the hearing until after attachment was, in the absence of unusual circumstances, "practically nil." *Pinsky v. Duncan, supra*, 898 F.2d at 856. This decision ignores *Mitchell*, in which this Court recognized that the state had an interest in facilitating debt collection by preventing a defendant from defeating a creditor's lien by transferring property. *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 608, 609; *North Georgia Finishing, Inc. vs. Di-chem, Inc., supra*, 419 U.S. at 610 (Powell, J., concurring) ("The State's legitimate interest in facilitating creditor recovery through the provisions of garnishment remedies has never been seriously questioned."); *see McCahey v. L. P. Investors, supra*, 774 F. 2d at 549 (the state has legitimate interests in "providing inexpensive and rapid methods of collecting judgments . . ."); *see Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1329 (3d Cir. 1982) ("[i]f the power of the courts to determine the rights of the parties to real property could be defeated by its transfer, *pendente lite*, to a purchaser without notice, additional litigation would be spawned and the public's confidence in the judicial process could be undermined.")

III. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO CLARIFY THE LEGAL ANALYSIS TO BE APPLIED BY THE LOWER COURTS.

As set forth above the amici believe that under this Court's prior decisions, § 52-278e(a)(1) does not violate the due process clause. Nevertheless, relying on this Court's due process prejudgment remedy decisions, *Sniadach v. Family Finance Corp.*,

395 U.S. 337 (1969), *Fuentes*, *Mitchell* and *North Georgia Finishing, Inc.*, lower courts have rendered inconsistent decisions and utilized inconsistent analytical approaches in this area. This is evidenced by the opinions of the three Second Circuit judges in this case, *see Pinsky v. Duncan, supra*, 898 F.2d at 859 (Mahoney, J., concurring) (court's conclusion "is not entirely free from doubt."), as well as by the opinions of the Connecticut Supreme Court in *Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, and *Kukanskis v. Griffith*, and four judges of the United States District Court for the District of Connecticut, *Shaumyan v. O'Neill*, 716 F. Supp. 65 (D. Conn. 1989); *Pinsky v. Duncan, supra*, 716 F. Supp. 58; *Read v. Jackson*, Civ. No. B-85-85 1988 Westlaw 163017 (D. Conn. Feb. 18, 1988); *Armstrong Cumming Architects v. Gruen*, No. B-88-680 (EBB) slip. op. (D. Conn. July 17, 1989), all holding that § 52-278e(a)(1) does not violate the due process clause. Other courts and commentators also have noted the inconsistencies, *e.g.*, *Jonnet v. Dollar Sav. Bank, supra*, 530 F.2d at 1126 (these "opinions have produced not only varying results, but different analytical approaches to due process problems."); Note, *The Constitutionality of Real Estate Attachments*, 37 Washington and Lee L. Rev. 701, 705 & n.26 (1980); Scott, *supra*, at 808, 809 & n.5; Note, *Constitutionality of Mechanic's Liens Statutes*, 34 Washington & Lee L. Rev. 1067, 1086 (1977), as have members of this Court, *see, e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 614 (Blackmun, J., dissenting) (prejudgment remedy statutes have been "left in questionable constitutional status, with little or no applicable standard by which to measure and determine their validity under the Fourteenth Amendment.")

There also is uncertainty as to whether the totality of the circumstances due process approach, *e.g. Zinermon v. Burch, supra*, __U.S.__, 110 S.Ct. at 984, should be applied to prejudgment remedy statutes, or whether a checklist approach based on the characteristics of the statutes addressed in *Mitchell v. W. T. Grant Co.* and *North Georgia Finishing, Inc. v. Di-Chem, Inc.* should be utilized. *E.g.* Note, *Creditors' Prejudgment Remedies and Due Process of Law - Connecticut's Summary Procedure Upheld: Fermont Division, Dynamics Corp. of America v. Smith*, 12 Conn. L. Rev. 174, 187-190 (1979); *Shaumyan v. O'Neill, supra*, 716 F. Supp. at 72, 73. Accordingly, this Court should clarify that the totality of the circumstances approach should be utilized and, for the reasons set forth above, reverse the Second Circuit's decision.

CONCLUSION

For all of the foregoing reasons, the Connecticut Bankers Association and the Savings Banks' Association of Connecticut respectfully submit that the petitioners' Petition should be granted and a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

Allan B. Taylor
Counsel of Record
James J. Tancredi
Kirk D. Tavtigian, Jr.
Deborah S. Chang
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

Attorneys for the Connecticut Bankers Association and the Savings Banks' Association of Connecticut

August 1990

APPENDIX

CONTENTS OF APPENDIX

CONNECTICUT BANKERS ASSOCIATION MEMBERS

American National Bank, Hamden
Bank of Boston Connecticut, Waterbury
Bank of Darien
Bank of East Hartford
Bank of Mystic
Bank of Southeastern Connecticut, Waterford
Bank of Southington
Bank of South Windsor
Bank of Stamford
Bank of Waterbury
BayBank Connecticut, N. A., Hartford
Brookfield Bank
Canaan National Bank
Candlewood Bank & Trust, New Fairfield
Citizens National Bank of Putnam
CityTrust, Bridgeport
Connecticut Bank & Trust, Hartford
Connecticut National Bank, Hartford
Connecticut Valley Bank, Cromwell
Equity Bank, Wethersfield
First Bank of West Hartford
First Central Bank, Hartford
First City Bank
First National Bank-CT, Hartford
First National Bank of Litchfield
First National Bank of Suffield
Fleet Bank of Connecticut
Founders Bank, New Haven
Glastonbury Bank & Trust
Greenwood Bank of Bethel
Housatonic Bank & Trust, Ansonia
Jewett City Trust Company
Lafayette Bank & Trust, Bridgeport

Landmark Bank, Hartford
Manchester State Bank
Merchants Bank & Trust, Norwalk
National Iron Bank, Salisbury
New Canaan Bank & Trust
New England Bank & Trust, Windsor
New Milford Bank & Trust
Norwalk Bank
Putnam Trust Company, Greenwich
Salisbury Bank & Trust, Lakeville
Saybrook Bank & Trust, Old Saybrook
Sentinel Bank, Hartford
Shoreline Bank & Trust, Madison
Summit National Bank, Torrington
Union Trust Company, Stamford
UST Bank Connecticut, Bridgeport
Vernon Bank
Village Bank & Trust, Ridgefield
Wilton Bank

SAVINGS BANKS' ASSOCIATION OF CONNECTICUT MEMBERS

Advest Bank, Hartford
American Bank of Connecticut, Waterbury
American Savings Bank, New Britain
Bank Mart, Bridgeport
Bank of Hartford
Branford Savings Bank
Bristol Savings Bank
Brooklyn Savings Bank, Danielson
Burritt InterFinancial Bancorporation, New Britain
Centerbank, Waterbury
Central Bank, Meriden
Chelsea Groton Savings Bank, Norwich
City Savings Bank of Meriden
Collinsville Savings Society
Colony Savings Bank, Wallingford
Community Savings Bank, Bristol
Connecticut Savings Bank, New Haven
Derby Savings Bank
Dime Savings Bank of Norwich
Dime Savings Bank of Wallingford
Essex Savings Bank
Fairfield County Savings Bank, Norwalk
Farmers & Mechanics Bank, Middletown
Farmington Savings Bank
Financial Federal Savings Bank, Hartford
First Constitution Bank, New Haven
First County Bank, Stamford
Gateway Bank, South Norwalk
Great Country Bank, Ansonia
Guilford Savings Bank
Jewett City Savings Bank
Liberty Bank for Savings, Middletown
Litchfield Bancorp

Mechanics Savings Bank, Hartford
Mechanics & Farmers Savings Bank, FSB, Bridgeport
MidConn Bank, Kensington
Milford Bank
Moodus Savings Bank
Naugatuck Savings Bank
New Haven Savings Bank
New Milford Savings Bank
New England Savings Bank, New London
Newtown Savings Bank
Northwest Bank for Savings, Winsted
Norwalk Savings Society
Norwich Savings Society
People's Bank, Bridgeport
Peoples Savings Bank, New Britain
Putnam Savings Bank
Ridgefield Bank
Savings Bank of Danbury
Savings Bank of Manchester
Savings Bank of Rockville
Society for Savings, Hartford
Southington Savings Bank
Stafford Savings Bank, Stafford Springs
State Bank for Savings, Southington
Suffield Bank
Thomaston Savings Bank
Tolland Bank
Torrington Savings Bank
Union Savings Bank of Danbury
Willimantic Savings Institute
Winsted Savings Bank

D.N. CV83 0067730S	)	SUPERIOR COURT
JOHN V. SODEN	)	
V.	)	
ROBERT E. JOHNSON, ET AL.	)	JUDICIAL DISTRICT
. . . . .	)	OF STAMFORD/
D.N. CV89 0105334S	)	NORWALK
GREENWICH TILE	)	AT STAMFORD
V.	)	
MALLOY	)	MARCH 26, 1990
. . . . .	)	
D.N. CV 89 0103308S	)	
BARNETT BANK	)	
V.	)	
GABOR J. MERTL, ET AL.	)	
. . . . .	)	
D.N. CV89 010533S	)	
GREENWICH TILE	)	
V.	)	
MALLOY DEVELOPMENT	)	
. . . . .	)	
D.N. CV89 0102621S	)	
NEW CANAAN FOREIGN CAR	)	
V.	)	
G. BARRETT MONTGOMERY	)	

MEMORANDUM OF DECISION
RE: MOTION TO DISSOLVE EXISTING
PREJUDGMENT REAL ESTATE ATTACHMENTS

This memorandum of decision addresses issues raised in motions filed by various defendants with this court to dissolve prejudgment attachments issued against their real estate. The attachments had been obtained *ex parte*, pursuant to Conn. Gen. Stat. § 52-278e. Section 52-278e has subsequently and very recently been declared to be unconstitutional on its face by the Second Circuit Court of Appeals. The Second Circuit's opinion, announced in *Pinsky v. Duncan*, No. 89-7521 (2nd Cir. March 9, 1990), found that Connecticut's *ex parte* prejudgment real estate attachment statute was unconstitutional on its face in that it deprived a defendant of his right to a hearing prior to issuance of the attachment in violation of the due process clause of the 14th Amendment to the United States Constitution. Not surprisingly, the *Pinsky* decision has generated a great deal of controversy about the continued validity of existing prejudgment real estate attachments, and has given rise to a flurry of motions to dissolve such attachments. This memorandum will address such motions generally.

At the outset, this court acknowledges that it is bound by the decisional law of our Supreme Court. However, the court also recognizes that the *Pinsky* decision has the potential to create chaos within the state's business and legal communities. Therefore, the issues raised by the *Pinsky* decision in the motions before this court should be addressed.

While decisions of federal courts passing on federal constitutional questions should be afforded due respect by the state courts, the federal courts exercise no appellate court jurisdiction over state courts. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970); *People v. Brisbon*, 129 Ill. 2d 200, 544 N.E. 2d 297, 135 Ill. Dec. 801 (Ill. 1989). Until the United States Supreme Court has spoken, state courts are not

precluded from exercising their own judgments on federal constitutional questions. *United States ex rel. Lawrence v. Woods*, 432 F.2d at 1075, quoting the Supreme Court of Iowa in *Iowa Nat'l. Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445, 454 (1930).

Our Supreme Court has spoken on the question of the constitutionality of Conn. Gen. Stat. § 52-278e and has determined that the statute meets the due process standards of the state and federal constitutions. *Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 397, 423 A.2d 80 (1979). Consequently, at this point in the process of judicial review of § 52-278e, this trial court is bound by the Connecticut Supreme Court's finding of constitutionality in *Fermont*. The opinions of the Supreme Court of Connecticut are binding upon the Superior Court and...until the court's decisions are changed, the Superior Court is bound to follow them. *Montes v. Hartford Hospital*, 26 Conn. Sup. 441, 442-43 (1966). Accordingly, as to the motions before this court which seek to vacate or dissolve existing prejudgment real estate attachments on the grounds of the Second Circuit Court of Appeals ruling in *Pinsky*, the motions are denied under *Fermont*.

However, even if this court were not bound by *Fermont*, and were to follow the *Pinsky* ruling, the question of whether *Pinsky* should be applied retroactively to invalidate all existing real estate attachments obtained through *ex parte* orders would still remain to be determined. In the interest of eliminating the speculation and uncertainty attendant to this issue, the following discussion is provided.

The United States Supreme Court considered the question of nonretroactive application of judicial decisions within a civil context in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.E. 2d 296, 92 S. Ct 349 (1971). In *Chevron*, the court identified the three factors to be weighed in each case to determine whether a judicial decision should be applied retroactively or prospectively. *Id.* at 106. First, the decision must establish a new principle of law, either by overturning clear past precedent or by deciding an issue of first impression. *Id.* Second, the court must determine whether

retrospective application of the new rule will further or retard its operation in each case. *Id.* at 107. Finally, if retroactive application of the court's decision could produce substantial inequitable results, there is ample basis for avoiding the hardship by a holding of nonretroactivity. *Id.* at 107.

Turning to the issue raised here by retroactive application of the *Pinsky* ruling, namely the continued validity of existing *ex parte* real estate attachments obtained pursuant to § 52-278e, the court concludes the new rule would be applied prospectively only.

A weighing of the merits and demerits of retroactive application of the *Pinsky* rule to existing *ex parte* real estate attachments in Connecticut demonstrates that substantial inequitable results may occur if *Pinsky* is not limited to prospective force. The decision clearly overturns past legal precedents in this state and renders unlawful statutory procedures upon which Connecticut litigants have reasonably relied. Retroactive operation of the decision will not further the operation of the rule. On the contrary, retroactive application of *Pinsky* would create hardship and injustice to creditors who have lawfully obtained attachments to secure their interests. The disruptive effect of summary dissolution of existing real estate attachments would be far-reaching and potentially devastating to an orderly business community. Issues relating to the validity of title to real estate and priority of secured interests would be implicated.

For the foregoing reasons, this court would follow the reasoning of the Supreme Courts of Massachusetts and Rhode Island, as well as the District Court of Massachusetts when, upon invalidating similar prejudgment real estate attachment statutes, those courts expressly held their decisions to have prospective application only. *See Marran v. Gorman*, 359 A.2d 694 (1976); *Bay State Harness Horse Racing and Breeding Ass'n. v. PPG Industries, Inc.*,

365 F. Supp. 1299 (D. Mass. 1973); *McIntyre v. Associates Financial Services Co.*, Mass., 328 N.E. 2d 492 (1975).

/s/
CIOFFI, J.

Decision entered in accordance with the foregoing dated this 26th day of March, 1990.

John Morrow
Chief Clerk

All counsel notified. J. M.

CV 89-0102197 S	:	SUPERIOR COURT
THE CHASE MANHATTAN BANK, N.A.	:	JUDICIAL DISTRICT OF STAMFORD/NORWALK AT STAMFORD
V.		
STEPHANIE W. SHEA	:	MAY 18, 1990

MEMORANDUM OF DECISION

The defendant Stephanie W. Shea has moved pursuant to General Statutes § 52-278e(c) to dissolve a prejudgment remedy consisting of an ex parte attachment of her real estate located in Darien in the amount of $9,000,000, which was granted by this court on August 31, 1989.[1] In addition, the plaintiff seeks an order that the defendant produce and deposit with the clerk of this court her shares of stock in a New York City cooperative apartment.

At various times in the latter part of 1988 and the early months of 1989 the plaintiff, The Chase Manhattan Bank, N.A. ("Chase"), loaned $8,275,000 to Deltrade International, Ltd., also known as Deltrade Delaware ("Deltrade"), in the form of a series of bankers' acceptance drafts, repayment of which was guaranteed by

[1] This decision is unaffected by the March 9, 1990 holding of the Court of Appeals for the Second Circuit in *Pinsky v. Duncan*, that Connecticut General Statues § 52-278e was unconstitutional for the reasons stated in my memorandum of March 27, 1990: (i) the property owner has been afforded a hearing; (ii) I believe the decision is prospective only, not retroactive; and (iii) the decision is not binding on this court in any event. On April 25, 1990, the Court of Appeals amended its prior opinion to state that: "...our declaration of the unconstitutionality of Conn. Gen. Stat. § 52-278(a)(1) shall have prospective effect only, *i.e.*, shall be applicable only to attachments filed after March 9, 1990."

Deltacorp., Inc., a company controlled by the same individuals owning Deltrade. There is no question that the loan was made and that it has not been paid, but both Deltrade and Deltacorp, Inc., are in bankruptcy. The defendant Shea was the president and a director of both Deltrade and Deltacorp, Inc., although the principal officer and chairman of each company was one Antonino Castellett.

Chase has sued Mrs. Shea claiming that she made fraudulent misrepresentations which induced Chase to make the loan in question. Although Mrs. Shea signed all the documents such as the purpose letters and assignments in her capacity as a corporate officer, Chase points to the law of agency and in particular to *Scribner v. O'Brien, Inc.*, 169 Conn. 389, 404, 363 A.2d 160 (1975) ("Where, however, an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby.") as authority that a corporate officer who makes fraudulent misrepresentations may be held personally liable for such misrepresentation.[2] See also Restatement (2nd) of Agency Law, S343, 348 (1958).

The loan by Chase was made to finance the purchase of sulphur by Deltrade. The transactions in question in this case were primarily purchases of sulphur from Shell Canada and sale through the Port of Vancouver, British Columbia, to C. Itoh. Chase alleges that it was defrauded by Mrs. Shea in several different ways: (i) that she misrepresented that a merger of Deltrade Bermuda and Deltrade Delaware had taken place; (ii) that in several cases there was no collateral for Chase's loan; (iii) that there was no matching of purchases and sales of sulphur as promised; and (iv) that several

[2] Plaintiff also sues Mrs. Shea for alleged violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), General Statutes § 42-110(a) *et seq.* This act, however, pertains only to unfair practices committed in this state, whereas the claims of fraud in this case are alleged to have occurred in New York. *Whelan Engineering Co. v. Tomar Electronics, Inc.*, 672 F. Supp. 659, 666 (D. Conn. 1987).

sales had been financed by another bank, double-financing in effect. Each of these alleged misrepresentations will be analyzed in further detail, but first, several other matters require discussion.

Both the Supreme Court and the Appellate Court have recently discussed the criteria for the dissolving or vacating of a prejudgment remedy. *New England Land Co., Ltd. v. DeMarkey*, 213 Conn. 612, 620, 569 A.2d 1098 (1990), makes it clear that the trial court's role is "...to determine probable success by weighing probabilities" and that the plaintiff has the burden of demonstrating "...that there is probable cause to sustain the validity of the claim." See also to the same effect *Sweet v. Sumnerebrook Mill Development Corporation*, 21 Conn. App. 191, 192-193, A.2d (1990).

The claim asserted is the tort of fraudulent misrepresentation, the "essential elements" of which were outlined in *Miller v. Appleby*, 185 Conn. 51, 54-55, 438 A.2d 811 (1981), as: "(1) that a false representation was made as a statement of fact; (2) that it was untrue and known to be untrue by the party making it; (3) that it was made to induce the other party to act on it; and (4) that the latter did so act on it to his injury."

This case is actually governed by the law of New York, where the events in question occurred, as pointed out previously in footnote 2, but there does not appear to be any discernible difference between Connecticut and New York law on the subject of fraud. See *Channel Master Corp. v. Aluminum, Ltd. Sales*, 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259, 151 N.E.2d 833 (1958), and also 60 N.Y.Jur.2d, Fraud and Deceit, S11.

Secondly, at the trial Chase will be obliged to present the "clear, precise and unequivocal" proof required to sustain a cause of action in fraud. *Campisano v. Nardi*, 212 Conn. 282, 285, 562 A.2d 1 (1989). In discussing the vacating of a prejudgment remedy in a fraud case *Common Condominium Assns., Inc. v. Common Associates*, 192 Conn. 150, 153, 470 A.2d 699 (1984), indicates

that in evaluating probable cause and whether a plaintiff will prevail, one must have in mind "...the higher standard of proof in fraud..."

One other point should be mentioned at this time. The defendant claims that there are mistakes and inconsistencies in the affidavit of one of Chase's representatives, Peter Galbraith, which was used to procure the ex parte real estate attachment. *Glanz v. Testa*, 200 Conn. 406, 408-409, 511 A.2d 341 (1986), however, provides that a plaintiff may present evidence at a hearing in support of an insufficient initial affidavit. Accord *Banks v. Vito*, 19 Conn. App. 256, 264, 562 A.2d 71 (1989), so the alleged deficiencies in the Galbraith affidavit are not at all crucial factors in my decision.

I have also, of course, taken into account the defendant's invocation of her Fifth Amendment right against self-incrimination which in turn permits an adverse inference to be drawn against the defendant.[3]

Olin Corporation v. Castells, 180 Conn. 49, 53-54, 428 A.2d 319 (1980), holds that such an adverse inference may be drawn, but does not necessarily have to be. This same adverse inference rule applies in New York. *Marine Midland Bank v. Russo Produce, Co.*, 50 N.Y.2d 31, 42, 427 N.Y.S.2d 961, 405 N.E.2d 205 (1980). See generally Heidt, The Conjurer's Circle: The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062, 1118-1119 (1982). It has been represented that a criminal case or investigation involving Castellett and the defendant is pending in New Jersey. It seems to me that employing the Fifth Amendment privilege where there is an actual existing criminal case is different from asserting the privilege solely to thwart a plaintiff in processing a civil case, and moreover, Chase's investigation of this case did not appear to have been impeded by Mrs. Shea's action.

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[3] "No person...shall be compelled in any criminal case to be a witness against himself..."; see also Connecticut Constitution, Art. First, sec. 8 ("[N]o person shall be compelled to give evidence against himself...")

Turning now to the specific allegations of fraud, the first involves a claim that Mrs. Shea induced the plaintiff to make the loan to Deltrade Delaware on her representation that the assets of a financially viable company, Deltrade Bermuda, had been merged with the Delaware company in early 1988, which was then to be the active trading entity. It is further alleged that no such merger occurred, that Deltrade Delaware had no assets and was a mere shell, and that had Chase been aware of this, it would not have made the loan in question to the Delaware company.

I do not believe that the plaintiff has shown probable cause with respect to this particular allegation of fraud. It remains rather vague as to exactly what Mrs. Shea is claimed to have said with respect to this merger, or even how important it was to Chase in inducing it to make the loan, particularly in the light of the fact that Deltacorp., Inc., the parent of both the Bermuda and Delaware subsidiaries, guaranteed the loan. One Chase witness did not remember any representations by the defendant on this subject and another was not sure of the exact words used. Also, Mrs. Shea at one point told another financial institution, American Express Bank, with which Chase was in contact, that the merger had not in fact occurred, and she also sent to Chase a financial statement which indicated, or at least implied, that no such merger had occurred.

The next claim of fraud involves several transactions in which the sulphur had already been sold to and paid for by C. Itoh before Deltrade received financing by Chase. However, the plaintiff retained a security interest in the proceeds of these sales, so it is not accurate to claim as does the plaintiff that it was thereby deprived of its collateral. Rather, the collateral, instead of consisting of inventory or receivables, became the actual funds paid for the sulphur by C. Itoh to Deltrade. In addition, when drawing down this money Mrs. Shea used different wording which in effect flagged the difference between these transactions.

Another allegation of fraud against the defendant Shea claims that on several occasions there were no matching purchases and sales

of sulphur by Deltrade. It is true that in several instances the sulphur purchases that were being financed by the plaintiff had not been pre-sold, and in one case a purported sale of 6403 metric tons to C. Itoh did not appear on that company's records. On the other hand, the total sales of sulphur by Deltrade and the number of tons financed by Chase were very much in tandem, approximately 50,000 metric tons, and, as the defendant points out, there was no specific reference as such in the loan agreement to a requirement of matching sales. The senior loan officer who gave final approval to the sale had not heard of the phrase mirror or matching sales, and another Chase witness agreed that the purchases of sulphur did not have to be backed formally by sales, but rather that it was the total of purchases and sales that was important.

In short, with respect to allegations of fraud grounded on lack of collateral or matching sales I find that the plaintiff has not sustained its burden of proof.

The plaintiff also complains that with respect to at least two sales of sulphur in late 1988 and in May 1989, American Express Bank had previously loaned money to Deltrade and had a lien on the same collateral as Chase. However, it is not at all clear that Chase was defrauded in this regard, because the plaintiff and Deltrade had previously signed an inter-creditor agreement which provided that in the event there was double-financing or pledging of the same collateral Chase would have a lien superior to that of any other financial institution. It is also arguable that American Express Bank was not financing specific purchases as such, but rather was loaning money to Deltrade on some other basis such as financing inventory.

In conclusion, if the standard of proof in this proceeding had been simply preponderance of the evidence as in the ordinary civil case, then theoretically the requisite probable cause could have been found because of the defendant's invocation of the Fifth Amendment. However, even with the Fifth Amendment inference working against Mrs. Shea, as it surely does, I cannot say that Chase has sustained its burden of showing probable cause based on "...the

higher standard of proof in fraud..." *Common Condominium Assns., Inc. v. Common Associates, supra*, 153.

Accordingly, the defendant's motion to vacate the attachment of her real estate is granted.

So Ordered.
Dated at Stamford, Connecticut this 18 day of May, 1990.

/s/
William Burke Lewis, J.

Decision entered in accordance with the foregoing.

5-18-90
Sean Quigley
Ass't. Clerk

All counsel notified

5-18-90

(5)

No. 90-143

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DiGIOVANNI,
Petitioners,

v.

BRIAN K. DOEHR,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

CLARINE NARDI RIDDLE
ATTORNEY GENERAL OF THE
STATE OF CONNECTICUT
HENRY S. COHN*
Assistant Attorney General
P.O. Box 120
Hartford, CT 06101
(203) 566-4990
Counsel for Petitioner,
State of Connecticut

ANDREW M. CALAMARI
Counsel for Petitioner DiGiovanni

JOANNE S. FAULKNER*
123 Avon Street
New Haven, CT 06511
(203) 772-0395
Counsel for Respondent

*Counsel of Record

Petition for Certiorari filed July 20, 1990.
Certiorari Granted October 1, 1990.

TABLE OF PARTS OF THE RECORD CONTAINED IN THE JOINT APPENDIX*

TABLE OF PARTS OF THE RECORD CONTAINED IN THE JOINT APPENDIX* (continued)

* The opinion of the United States Court of Appeals (March 9, 1990), Opinion on Rehearing (April 25, 1990), Order on Suggestion for Rehearing in *Banc* (May 30, 1990), Modification of Opinion (June 25, 1990), Amended Opinion of Second Circuit appear in the Appendix to the Petition for Writ of Certiorari at 1A to 39A. The Opinion rendered by the United States District Court appears in the Appendix to the Petition for Writ of Certiorari at 40A to 44A. The Judgment of the United States District Court for the District of Connecticut appears in the Appendix to the Petition for Writ of Certiorari at 45A.

RELEVANT DOCKET ENTRIES IN THE COURTS BELOW

I. United States District Court for the District of Connecticut

Docket No. N-88-339WWE

August 8, 1988	Complaint Filed
August 31, 1988	Motion for Summary Judgment filed by Plaintiffs
	Statement of Material Facts, filed by Plaintiffs
December 1, 1988	Motion for Summary Judgment Denied. Eginton, J.
December 5, 1988	Plaintiff's Motion to Reconsider and Vacate filed
December 28, 1988	Motion to Reconsider is granted. Upon reconsideration, the Court's ruling on December 1, 1988 is affirmed. Eginton, J.
January 23, 1989	Motion for Summary Judgment and Statement of Material Facts filed by Defendant.
January 26, 1989	Answer of the Defendant filed.
February 17, 1989	Memo of Decision. The Motion for Summary Judgment is granted. Eginton, J.
February 21, 1989	Judgment filed and entered. It is therefore ordered and adjudged that judgment be and is hereby entered for the defendants and the case is removed from the docket of the Court.
March 7, 1989	Notice of Appeal filed by Plaintiffs. Order of February 21, 1989.

II. United States Court of Appeals for the Second Circuit

Docket No. 89-7521

October 5, 1989	Case heard before Newman, Pratt, Mahoney, CJJ
December 4, 1989	Intervenor, State of Connecticut, brief filed per Court request
March 9, 1990	Judgment reversed and remanded by published signed opinion per Judge Pratt. Concurrence by separate published signed opinion per Judge Mahoney. Dissent by separate published signed opinion per Judge Newman. Judgment filed.
March 22, 1990	Intervenor State of Connecticut petition for rehearing and suggestion for rehearing in banc filed.
March 23, 1990	Appellees John F. DiGiovanni petition for rehearing with suggestion for rehearing en banc filed.
April 25, 1990	Opinion granting intervenor State of Connecticut and Appellees John F. DiGiovanni *only insofar as to amend the prior opinion,* to hold that, except for the present case, our declaration of the unconstitutionality of Conn. Gen. Stat. § 52-278(a)(1) shall have prospective effect, only, i.e., shall be applicable only to attachments filed after March 9, 1990; *Petitions are denied in all other respects, filed.*

May 2, 1990	Appellee John F. DiGiovanni Motion for Stay of mandate pending filing petition for writ of certiorari filed.
May 7, 1990	Order *Denied* Appellee John F. DiGiovanni Motion for Stay of mandate pending filing for writ of certiorari filed.
May 29, 1990	Order that the panel that heard the appeal having granted in part and denied in part said petitions for rehearing in an opinion filed on April 25, 1990; it is further noted that the *suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon filed.*
June 8, 1990	Mandate issued (opinion, judgment and statement of costs) to the district court.
June 25, 1990	*ORDER OF MODIFICATION:* On motion of Joanne S. Faulkner, attorney for plaintiff-appellant Doehr, the first paragraph of the decision of this court, dated April 25, 1990, granting in part the petition for rehearing, is modified to read as per indicated on the second page of this order filed.
July 26, 1990	NOTICE OF FILING petition for writ of certiorari by DiGiovanni, et al., dated July 20, 1990 Supreme Court #90-143 filed.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROLAND PINSKY and JENNIE PINSKY
EILEEN FEDOWITZ
BRIAN K. DOEHR — Filed August 8, 1988

V. — CIV. NO. N-88-339 WWE

RICHARD K. DUNCAN
JOSEPH GOLDEN INSURANCE AGENCY
JOHN F. DI GIOVANNI

COMPLAINT

1. This is a class action by persons whose real property was attached in conjunction with a lawsuit seeking to collect a disputed debt, without prior notice of other safeguards, by the defendants.

2. The complaint seeks actual and punitive damages against defendants for wrongful attachment and, on behalf of a class, seeks an injunction and a declaratory judgment that Connecticut's prejudgment remedy statute is in violation of plaintiffs' rights to due process and equal protection, together with damages against the defendants under 42 U.S.C. section 1983 and the Fourteenth Amendment to the United States Constitution.

3. Jurisdiction is conferred on this court by 28 U.S.C. sections 1331 and 1343.

4. Plaintiffs are citizens of the United States and residents of New Haven County, Connecticut.

5. Defendants are individuals or entities located in New Haven County, Connecticut.

FACTUAL ALLEGATIONS — Pinskys

6. On June 8, 1988, defendant Richard Duncan, by and through his attorney, attached property of "Roland S. Pinsky, Jeri Pinsky, Susan Avigdor" at 131 Ward Street, New Haven, in connection with a lawsuit against said parties returnable to the Superior Court for the Judicial District of New Haven on July 5, 1988.

7. Susan Avigdor and "Jeri" Pinsky have no interest in said property.

8. Said attachment was made pursuant to an order of Judge Ronald Fracasse, upon application of the defendant Duncan. The sole reason recited as a basis for the application was that "The prejudgment remedy now asked for is an attachment of real property now or formerly of the defendants located in the Town of New Haven, Connecticut."

9. Duncan was aware that the defendants in the state court action disputed the obligation asserted in the complaint.

10. Duncan had no interest in or claim to the property attached.

11. Duncan did not allege, and had no reasonable cause to believe, that special or emergency circumstances existed which would justify an attachment of property prior to judgment.

12. Duncan intended to deprive the Pinskys of the use and enjoyment of their property, and to deprive them of advance notice and opportunity to be heard before attachment of their property.

13. His application for ex parte prejudgment remedy, conclusorily alleged that "there is probable cause that a judgment enter in favor of" himself, and further that "To the best of plaintiff's knowledge, defendants have no set-offs or counterclaims against the plaintiffs."

14. In seeking the attachment, defendant Duncan did not, and could not, allege that (1) the Pinskys were not otherwise subject to the jurisdiction of the state court; (2) that the Pinskys had hidden themselves so that process could not be served on them; (3) that the Pinskys were about to remove themselves or their real property from the state; (4) that the Pinskys had or were about to fraudulently dispose of their property with intent to hinder, delay or defraud his creditors; (5) that the Pinskys had fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of their debts, (5) that the Pinskys had stated that they are insolvent or unable to pay their debts as they mature or (6) that the transaction was a commercial transaction.

FACTUAL ALLEGATIONS — Fedowitz

15. Under a return date of May 3, 1988, defendant Joseph Golden Insurance Agency, Inc. ("Golden"), brought an action in Superior Court, New Haven, CV-87-0256318, against Sidney and Eileen Fedowitz, on the basis that each was liable to Golden for the premiums on certain insurance policies.

16. On April 13, 1988, defendant Golden, by and through its attorney, attached property of Eileen Fedowitz at 615 Ellsworth Avenue, New Haven, in connection with said lawsuit.

17. Said attachment was made pursuant to an order of Judge Ronald Fracasse, upon application of the defendant Golden. The sole reason recited as a basis for the application was that "The prejudgment remedy requested is for an attachment of real property."

18. Golden had no interest in or claim to the property attached.

19. Golden did not allege, and had no reasonable cause to believe, that special or emergency circumstances existed which would justify an attachment of property prior to judgment.

20. Golden intended to deprive Ms. Fedowitz of the use and enjoyment of her property, and to deprive her of advance notice and opportunity to be heard before attachment of the property.

21. The application for ex parte prejudgment remedy, alleged the opinion that "there is probable cause that a judgment will be rendered in favor" of the applicant.

22. In seeking the attachment, defendant Golden did not allege that (1) Fedowitz was not otherwise subject to the jurisdiction of the state court; (2) that Fedowitz had hidden herself so that process could not be served on her; (3) that Fedowitz was about to remove herself or the real property from the state; (4) that Fedowitz had or was about to fraudulently dispose of her property with intent to hinder, delay or defraud her creditors; (5) that Fedowitz had fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of her debts, (5) that Fedowitz had stated that she was insolvent or unable to pay her debts as they mature or (6) that the transaction was a commercial transaction.

Factual Allegations — Doehr

23. In March, 1988, defendant John Di Giovanni, by and through his attorney, attached property of Brian K. Doehr at 53 Woodland Street, Meriden, Connecticut, in connection with a lawsuit against plaintiff Doehr returnable to the Superior Court for the Judicial District of New Haven at Meriden on April 19, 1988.

24. Said attachment was made pursuant to an order of a Judge of the Superior Court, upon application of the defendant Di Giovanni. The sole reason recited as a basis for the application was that "The prejudgment remedy requested is for an attachment of real property."

25. Di Giovanni was aware that the defendant in the state court action disputed the obligation asserted in the complaint.

26. Di Giovanni had no interest in or claim to the property attached.

27. Di Giovanni did not allege, and had no reasonable cause to believe, that special or emergency circumstances existed which would justify an attachment of property prior to judgment.

28. Di Giovanni intended to deprive Doehr of the use and enjoyment of his property, and to deprive him of advance notice and opportunity to be heard before attachment of the property.

29. His application for ex parte prejudgment remedy conclusorily alleged that "there is probable cause that a judgment will be rendered in favor of" himself, and further alleged the opinion that "there is probable cause that a judgment will be rendered" in his favor.

30. In seeking the attachment, defendant Di Giovanni did not, and could not, allege that (1) Doehr was not otherwise subject to the jurisdiction of the state court; (2) that Doehr had hidden himself so that process could not be served on him; (3) that Doehr was about to remove himself or the real property from the state; (4) that Doehr had or was about to fraudulently dispose of property with intent to hinder, delay or defraud his creditors; (5) that Doehr had fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of his debts, (5) that Doehr had stated that he was insolvent or unable to pay his debts as they mature or (6) that the transaction was a commercial transaction.

STATUTORY SCHEME

31. Each plaintiff has had his or her real property attached, without prior notice and without a prior opportunity to be heard, pursuant to section 52-278e(1), which allows a prejudgment remedy to be issued without bond, and without any showing of extraordinary circumstances as is required under section 52-278e(2), merely because the proposed defendant owns real property.

32. Section 52-278e(1) violates plaintiffs' rights to equal protection of the law in the exercise of their basic civil rights to acquire, enjoy, own and dispose of property and their rights of access to the courts, in that

(a) the section has no rational relationship to any valid state interest;

(b) it arbitrarily discriminates against and burdens defendants based solely on real property ownership;

(c) it is not limited in its effect to actions in which the title to unique real property is at issue;

(d) it is not limited in its effect to burdening property of actual obligors, but also burdens property of non-obligated co-owners of the property;

(e) it allows a plaintiff to get an ex parte attachment on real property without notice, but requires a defendant to provide such notice [section 52-278i];

(f) no bond is required to protect the defendant from wrongful attachments of property in which the plaintiff has no interest, whereas a bond is required when a replevin party tries to get his own property back;

(g) if the action has already begun, no prior notice or prior opportunity for hearing is afforded the defendant who

owns real property before action is taken against his interests, as is afforded to other defendants in the normal course of pleading.

33. Section 52-178e(1) violates plaintiffs' rights to due process of the law in the exercise of their basic civil rights to acquire, enjoy, own and dispose of property and their rights of access to the courts, in that

(a) no prior notice of the real estate attachment is required;

(b) no prior notice of defendant's rights is required;

(c) no emergency or extraordinary situation must be alleged;

(d) no opportunity for hearing prior to the attachment is provided;

(e) no prompt post-attachment hearing is required (the plaintiff has ninety days to return the attachment to court under section 52-278j);

(f) no bond is required;

(h) if the action has already begun, no prior notice or prior opportunity for hearing is afforded the defendant as in the normal course of pleading;

(i) even though a plaintiff ordinarily has the burden of proof, the burden is imposed on the defendant to obtain a bond or otherwise obtain release of his property before plaintiff has proven its case;

(j) there is no notice, either prior to or after the attachment, and no opportunity to be heard, for a non-obligated co-owner to challenge the attachment as it affects that person's ability to own, use and enjoy real property.

(k) there is no direct and simple remedy for mistaken deprivations caused by false and conclusory applications and affidavits such as were submitted to the court in these cases.

34. In obtaining ex parte attachments of real property, defendants act jointly with state officials: a Judge of the Superior Court, without whose order no attachment could be obtained, and a sheriff, who serves the attachment papers.

CLASS ACTION

35. Plaintiffs bring this action individually and pursuant to Rule 23(a), (b)(2) and b)(3) of the Federal Rules of Civil Procedure on behalf of all other persons similarly situated. The class is composed of all residents of the State of Connecticut who own real property and have been or will be sued for payment of a consumer debt. This is a proper class action under Rule 23 of the Federal Rules of Civil Procedure in that:

(a) the parties affected are so numerous that joinder of all parties is impracticable;

(b) there are common questions of law or fact which predominate over any questions which affect only individual members;

(c) the claims of the representative plaintiffs are typical of those of the class;

(d) the representative plaintiffs will fairly and adequately protect the interests of the class;

(e) the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief to the class as a whole; and

(f) the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action may be maintained as a class action on the terms described herein.

2. Grant temporary, preliminary and permanent injunctive relief, pursuant to Rule 65 of Federal Rules of Civil Procedure, enjoining defendants from attaching a consumer's real property unless they show the special circumstances set forth in § 52-278e(2) Conn. Gen. Stat.

3. Issue a declaratory judgment that defendants have violated the due process and equal protection rights of the plaintiffs and the class they represent.

4. Award plaintiffs all costs, including attorneys fees, incurred herein.

5. Award each plaintiff actual damages and punitive damages in excess of $10,000 and such other and further relief as this Court may deem just or equitable.

PLAINTIFFS

BY /s/ Joanne S. Faulkner
Joanne S. Faulkner
123 Avon Street
New Haven CT 06511
(203) 562-3501

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROLAND PINSKY ET AL.

v. CIV. NO. N-88-339 WWE

RICHARD K. DUNCAN ET AL. August 30, 1988

MOTION FOR SUMMARY JUDGMENT

Plaintiffs move for summary judgment on their claims for declaratory and injunctive relief. Plaintiffs claim that the Connecticut statute allowing a prejudgment attachment of real property without a bond and without a showing of special circumstances violates rights under the Due Process and Equal Protection Clauses of the United States Constitution. As to the declaratory and injunctive relief sought, plaintiffs claim the statute is unconstitutional on its face, and there are no genuine issues as to any material fact.

ORAL ARGUMENT NOT REQUESTED

THE PLAINTIFFS

By _____
JOANNE S. FAULKNER
ATTORNEY AT LAW
123 Avon Street
New Haven, Connecticut 06511
(203) 562-3501

Certification to Richard K. Duncan, 375 Lombard St, New Haven CT 06513, Jos. Golden Insurance Agency, 95 Crown St., New Haven CT 06509, and John Di Giovanni, 273 Byron Rd, South Meriden CT 06450 on August 30, 1988.

_____
Joanne S. Faulkner

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROLAND PINSKY ET AL.

v. CIV. NO. N-88-339 WWE

RICHARD K. DUNCAN ET AL. August 30, 1988

STATEMENT OF MATERIAL FACTS

1. Each plaintiff herein was sued in state court by the respective named defendants, as more fully set forth in the complaint.

2. Prior to the inception of the suit, pursuant to § 52-278e(1), each plaintiff had real property attached without prior notice or opportunity to be heard, in the absence of emergency or special circumstances, without bond to protect them against wrongful attachment, and without prior notice, pursuant to the procedures of Chapter 903a of the Connecticut General Statutes.

THE PLAINTIFFS

By _____
JOANNE S. FAULKNER
ATTORNEY AT LAW
123 Avon Street
New Haven, Connecticut 06511
(203) 562-3501

Certification to Richard K. Duncan, 375 Lombard St, New Haven CT 06513, Jos. Golden Insurance Agency, 95 Crown St., New Haven CT 06509, and John Di Giovanni, 273 Byron Rd, South Meriden CT 06450 on August 30, 1988.

_____
Joanne S. Faulkner

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROLAND PINSKY ET AL. Filed August 31, 1988

v. CIV. NO. N-88-339 WWE

RICHARD K. DUNCAN ET AL. August 30, 1988

MOTION FOR SUMMARY JUDGMENT

Plaintiffs move for summary judgment on their claims for declaratory and injunctive relief. Plaintiffs claim that the Connecticut statute allowing a prejudgment attachment of real property without a bond and without a showing of special circumstances violates rights under the Due Process and Equal Protection Clauses of the United States Constitution. As to the declaratory and injunctive relief sought, plaintiffs claim the statute is unconstitutional on its face, and there are no genuine issues as to any material fact.

ORAL ARGUMENT
NOT REQUESTED

THE PLAINTIFFS

By /s/ Joanne S. Faulkner
JOANNE S. FAULKNER
ATTORNEY AT LAW
123 Avon Street
New Haven, Connecticut 06511
(203) 562-3501

*

Certification to Richard K. Duncan, 375 Lombard St, New Haven CT 06513, Jos. Golden Insurance Agency, 95 Crown St., New Haven CT 06509, and John Di Giovanni, 273 Byron Rd, South Meriden CT 06450 on August 30, 1988.

/s/ Joanne S. Faulker
Joanne S. Faulkner

*Marginal Ruling:
December 1, 1988: "The facial constitutional validity of Sec. 52-278e . . . stands beyond question . . ." *Read v. Jacksen*, Civil No. B-85-85, Ruling on Defendant's Motions for Summary Judgment, slip op. at 8 (D. Conn. February 19, 1988) (Zampano, J.). Motion DENIED.

/s/ Warren W. Eginton
WARREN W. EGINTON, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROLAND PINSKY ET AL. Filed December 5, 1988

v. CIV. NO. N-88-339 WWE

RICHARD K. DUNCAN ET AL. December 5, 1988

PLAINTIFF'S MOTION TO RECONSIDER AND VACATE

Plaintiffs respectfully move this Court to reconsider and vacate the orders entered herein on December 1, 1988, denying plaintiffs' Motions for Summary Judgment and Class Certification, and granting one defendant's Motion for Summary Judgment solely on the basis of a general statement in *Read v. Jacksen*, B-85-85.

That case is unlike the instant case, since it involved the constitutionality of post-attachment proceedings. This involves the constitutionality of the prejudgment attachment (PJR) itself.

In *Read v. Jacksen*, Judge Zampano was not asked to decide, and did not decide, whether a PJR without a bond is constitutional. The cases which have actually considered that issue are uniform in ruling that a PJR statute without a bond is unconstitutional.

In *Read v. Jacksen*, Judge Zampano was not asked to decide, and did not decide, whether a PJR based solely on the fact that a state court defendant owns real property is constitutional. The cases which have actually considered that issue are uniform in ruling that such a statute is unconstitutional.

*

Plaintiffs submit that they should not be deprived of their opportunity to be heard on the specific issues they are

raising in the instant case, because of dicta in a decision considering different and unrelated issues between different and unrelated parties. No principle of collateral estoppel or res judicata supports such a result. An unsuccessful attack on the constitutionality of a statute on specific issues should not thereby preclude others from bringing a different attack on different issues.

There is, and has been for several years, no open question as to centrality of the bond requirement, or as to the invalidity of an ex parte attachment of real property just because it is real property. Those issues were not addressed in *Read*.

Since the defendant has been able to cite no cases upholding the constitutionality of the statute with reference to the specific aspects challenged in this case, and since the constitutional case law in the area of prejudgment attachments has been well established since 1975, and since Connecticut's statute was drafted in response to pre-1973 authority, plaintiffs' Motion for Summary Judgment should instead have been granted, and the defendant's Motion denied.

PLAINTIFFS

By _____

Joanne S. Faulkner
123 Avon Street
New Haven CT 06511
(203) 562-3501

*Marginal Ruling:
December 28, 1988: The motion to reconsider is GRANTED. Upon reconsideration, the Court's ruling of December 1, 1988 is AFFIRMED.

/s/ Warren W. Eginton
WARREN W. EGINTON, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

EILEEN FEDOWITZ ET AL. :

VS. :

CIVIL NO. N-88-338 WWE

JOSEPH GOLDEN INSURANCE AGENCY, INC. ET ALS :

:

MOTION FOR SUMMARY JUDGEMENT BY DEFENDENT, JOHN F. DIGIOVANNI

The Defendant, John F. DiGiovanni, moves for summary judgement in his favor for the following reasons:

1. There are no genuine issues as to any material fact.

2. The Connecticut Statute (Section 52-278 e) allowing a prejudgement attachment of real estate without a prior hearing does not violate rights under the due process and equal protection clause of the United States Constitution and is constitutional on it's face.

Argument not required.
Testimony not requested.

The Defendant, John F. DiGiovanni

By _____
His Attorney

I hereby certify that a copy of the foregoing Motion by Summary Judgement was mailed to Joanne S. Faulkner, 123 Avon Street, New Haven, CT. 06511, Attorney for Eileen Fedowitz et al, to the Defendant, Attorney David Greenberg of 385 Orange Street, New Haven, CT. for Richard K. Duncan, 375 Lombard Street, New Haven, CT., 06513 to Lawrence J. Greenberg and Milton A. Bernblum of the firm Gold, Bernblum & Greenberg, One Whitney Avenue, New Haven CT. 06510 attorneys for the defendant Joseph Golden Insurance Agency, Inc., by United States Mail, postage prepaid on this 20th day of January, 1989.

JOSEPH P. PATRUCCO
ATTORNEY FOR JOHN F. DI GIOVANNI

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

EILEEN FEDOWITZ ET AL :

VS. :

CIVIL NO. N-88-338 WWE

JOSEPH GOLDEN INSURANCE :
AGENCY, INC. ET ALS

:

STATEMENT OF MATERIAL FACTS

1. By complaint dated March 15, 1988, returnable to the Superior Court held at Meriden for the Judicial District of New Haven, on the 21rst day of March 1988, the Defendant herein, John F. Di Giovanni, commenced an action for assault and battery against the Plaintiff, Brian K. Doehr. (See Appendix A-1 through A-9).

2. In Conjunction with said commencement of the action, the Defendant herein, John F. Di Giovanni, in accordance with the provisions of Chapter 903 A of the Connecticut General Statutes, Rev. 1987, and in particular, Section 52-278e thereof, secured an ex parte prejudgment remedy in the nature of an attachment of real estate jointly owned by the Plaintiff herein, Brian K. Doehr. (See Appendix A1 through A9).

3. In further conjunction therewith, the Defendant herein, John F. Di Giovanni, filed an affidavit setting forth facts sufficient to show that there was probable cause that a judgment would be rendered in that action for the Defendant herein, John F. Di Giovanni, and against the Plaintiff herein, Brian K. Doehr. (See Appendix A1 through A9).

4. The process served upon the Plaintiff herein, Brian K. Doehr, contained the following notice:

RETURN DATE: APRIL 19, 1988 SUPERIOR COURT

JOHN F. DI GIOVANNI JUDICIAL DISTRICT
OF NEW HAVEN

VS.

AT MERIDEN

BRIAN K. DOEHR MARCH 15, 1988

NOTICE TO DEFENDANT

You have rights specified in the Connecticut General Statutes, including Chapter 903 a, which you may wish to exercise concerning this prejudgement remedy. These rights include: (1) The right to a hearing to object to the prejudgement remedy for lack of probable cause to sustain the claim; (2) The right to a hearing to request that the prejudgement remedy be modified, vacated or dismissed or that bond be substituted; and (3) The right to a hearing as to any portion of the property attached which you claim is exempt from execution.

THE PLAINTIFF

BY: JOSEPH P. PATRUCCO
HIS ATTORNEY

5. On or about April 12, 1988 an appearance in the case was made in behalf the Plaintiff, Brian K. Doehr, by Attorney Irving J. Pinsky (See Appendix B).

6. Thereafter, and up to the date of this Motion for Summary Judgement, The Plaintiff, Brian K. Doehr, through his appearing attorney, Attorney Irving J. Pinsky, has not made any effort or application to dissolve, modify, or otherwise have a hearing for relief with regard to said prejudgement attachment, all as made available to him under Chapter 903 a of the Connecticut General Statutes.

The Defendant, John F. Di Giovanni

By _____
His Attorney

RETURN DATE: APRIL 19, 1988 — SUPERIOR COURT

JOHN F. DI GIOVANNI — JUDICIAL DISTRICT OF NEW HAVEN

VS. — AT MERIDEN

BRIAN K. DOEHR — MARCH 15, 1988

APPLICATION

The undersigned represents:

1. That JOHN F. DI GIOVANNI of 273 Byron Road, South Meriden, Connecticut is about to commence an action against BRIAN K. DOEHR of 53 Woodland Street, Meriden, Connecticut pursuant to the attached proposed unsigned writ, summons, complaint and affidavit.

2. That there is probable cause that a judgment will be rendered in such matter in favor of the applicant and to secure such judgment the applicant seeks an order from this court directing that the following prejudgment remedy be issued to secure the sum of $75,000.00.

To attach the following described real property of the defendant, Brian K. Doehr, located in the City of Meriden and further described as follows:

> As described on Schedule A attached hereto and made a part hereof.

3. The prejudgment remedy requested is for an attachment of real property.

JOHN F. DI GIOVANNI

BY: /s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
HIS ATTORNEY

Appendix A-1

RETURN DATE: APRIL 19, 1988 SUPERIOR COURT

JOHN F. DI GIOVANNI JUDICIAL DISTRICT OF NEW HAVEN

VS. AT MERIDEN

BRIAN K. DOEHR MARCH 16, 1988

AFFIDAVIT

STATE OF CONNECTICUT)
) ss. At Meriden
COUNTY OF NEW HAVEN)

Personally appeared, John F. DiGiovanni, who being duly sworn, deposes and says:

1. I am thoroughly familiar with the facts contained in the unsigned complaint and in the application for prejudgment remedy in the above entitled matter, and the facts set forth in each are true to the best of my knowledge and belief.

2. On March 13, 1988 I was willfully, wantonly and maliciously assaulted by the defendant, Brian K. Doehr.

3. Said assault and battery broke my left wrist and further caused an ecchymosis to my right eye, as well as other injuries to my head, limbs and body.

4. My left arm is in a cast and I am restricted in my usual duties and I have further expended sums of money for medical care and treatment and I will be obliged to expend further sums in the future.

5. In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff.

/s/ John F. DiGiovanni
JOHN F. DI GIOVANNI, PLAINTIFF

Appendix A-2

On This this 16th day of March, 1988, before me, Joseph P. Patrucco, the undersigned officer, personally appeared, John F. DiGiovanni, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained, as his free act and deed.

/s/ Joseph P. Patrucco
COMMISSIONER OF THE
SUPERIOR COURT

RETURN DATE: APRIL 19, 1988 SUPERIOR COURT

JOHN F. DI GIOVANNI JUDICIAL DISTRICT OF NEW HAVEN

VS. AT MERIDEN

BRIAN K. DOEHR MARCH 16, 1988

ORDER FOR PREJUDGMENT REMEDY

Whereas, the plaintiff in the above entitled action has made application for a prejudgment remedy to attach real property of the defendant, and

Whereas, from an examination of the application, proposed complaint and accompanying affidavit, it is found that there is probable cause to sustain the validity of the plaintiff's claim, that the application should be granted ex parte because the prejudgment remedy requested is for an attachment of real property.

Now, therefore, it is hereby ordered that the plaintiff may attach to the value of $75,000.00 the following goods or estate of the defendant, BRIAN K. DOEHR, the real estate as described in Schedule A attached hereto.

Dated at Meriden, Connecticut this 17th day of March, 1988

BY THE COUNT (,J.)

[signature illegible]
JUDGE.

Appendix A-3

RETURN DATE: APRIL 19, 1988 SUPERIOR COURT

JOHN F. DI GIOVANNI JUDICIAL DISTRICT OF NEW HAVEN

VS. AT MERIDEN

BRIAN K. DOEHR MARCH 15, 1988

To Any Proper Officer:

By Authority of the State of Connecticut, you are hereby commanded, in accordance with the accompanying order, to attach to the value of $75,000.00, the goods or estate of BRIAN K. DOEHR, of 53 Woodland Street, Meriden, Connecticut and summon him to appear before the Superior Court for the Judicial District of New Haven at Meriden on the 19th day of April, 1988, such appearance to be made by each of defendants or their attorney by filing a written statement of appearance with the Clerk of the Court on or before the second day following the return date, then and there to answer unto JOHN F. DI GIOVANNI of 273 Byron Road, South Meriden, Connecticut, in a civil action wherein the plaintiff complains and alleges as set forth in the accompanying complaint.

E. Drezak of 39 Butler Street, Meriden, conn. is recognized in the sum of $250.00 to prosecute, etc.

/s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
COMMISSIONER OF THE SUPERIOR COURT

Appendix A-4

RETURN DATE: APRIL 19, 1988 | SUPERIOR COURT

JOHN F. DI GIOVANNI | JUDICIAL DISTRICT OF NEW HAVEN

VS. | AT MERIDEN

BRIAN K. DOEHR | MARCH 15, 1988

COMPLAINT

1. On March 13, 1988 the defendant assaulted the plaintiff and beat him with his fists.

2. Said assault and battery broke the plaintiff's left writ, and caused an ecchymosis to his right eye, as well as other injuries to my head, limbs and body.

3. The assault was willful, wanton and malicious.

4. As a result of said injuries the plaintiff has been and in the future will be obliged to expend sums of money for medical care and treatment, doctors, hospitals, x-rays, physio therapy, medical appliances and medicines.

5. As a further result of said injuries the plaintiff has been and will be restricted in his usual activities.

The Plaintiff Claims Damages.

PLAINTIFF

BY: /s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
HIS ATTORNEY

Appendix A-5

AMOUNT IN DEMANT

The amount, legal interest or property in demand is not less than $15,000.00 exclusive or interest and costs.

Appendix A-6

SCHEDULE A

All that certain piece or parcel of land, with all buildings and improvements thereon, known as No. 53 Woodland Street and situtated in the City of Meriden County of New Haven and State of Connecticut, bounded and described as follows:

NORTH: by land now or formerly of Caroline Treiber, 120 feet;

EAST: by land now or formerly of Meriden, Waterbury & Connecticut River Railroad, 54', 9";

SOUTH: by land now or formerly of Frank Klein, 95 feet;

WEST: by Woodland Street, 50 feet.

Appendix A-7

RETURN DATE: APRIL 19, 1988 | SUPERIOR COURT

JOHN F. DI GIOVANNI | JUDICIAL DISTRICT OF NEW HAVEN

VS. | AT MERIDEN

BRIAN K. DOEHR | MARCH 15, 1988

NOTICE TO DEFENDANT

You have rights specified in the Connecticut General Statutes, including Chapter 903 a, which you may wish to exercise concerning this prejudgment remedy. These rights include: (1) The right to a hearing to object to the prejudgment remedy for lack of probable cause to sustain the claim; (2) The right to a hearing to request that the prejudgment remedy be modified, vacated or dismissed or that a bond be substituted; and (3) the right to a hearing as to any portion of the property attached which you claim is exempt from execution.

THE PLAINTIFF

BY: /s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
HIS ATTORNEY

Appendix A-8

State of Connecticut)
) ss. Meriden March 21, A.D. 1988
County of New Haven)

Then and there by virtue hereof and by a court order and direction of the Plaintiff's Attorney, I attached all right, title and interest of the within named defendant BRIAN K. DOEHR in and to the following described piece or parcel of land, situated in said Town of Meriden in said County, together with all the buildings standing thereon, by leaving at the office of the Town Clerk of said Town of Meriden a certificate of attachment, according to law, in which certificate is specified the court to which this writ is returnable, the parties hereto, the amount of damages claimed herein, the land bounded and described as follows, to wit:

SCHEDULE A

All that certain piece or parcel of land, with all buildings and improvements thereon, known as No. 53 Woodland Street and situtated in the City of Meriden County of New Haven and State of Connecticut, bounded and described as follows:

NORTH: by land now or formerly of Caroline Treiber, 120 feet;

EAST: by land now or formerly of Meriden, Waterbury & Connecticut River Railroad, 54', 9";

SOUTH: by land now or formerly of Frank Klein, 95 feet;

WEST: by Woodland Street, 50 feet.

And afterwards on the 21st day of March A.D., 1988, I left a true and attested copy of the original Application of Prejudgment Remedy, Affidavit, Schedule "A", Exhibit, Order and Writ, Summons and Complaint with my doings thereon endorsed as follows: At the usual place of abode of the within-named Defendant, BRIAN K. DOEHR at 53 Woodland Street in the Town of Meriden.

The within and foregoing is the original with my doings endorsed hereon.

FEES:

Copy	$ 8.00
Service	20.00
Endorsement	.80
Travel	1.20
Certificate	5.00
Search Records	5.00
Town Clerk's Fee	5.00
TOTAL	$45.00

ATTEST,

Sanford E. Sheftel,
Deputy Sheriff

Appendix A-9

Return Date April 19, 1988

Docket No.

JOHN F. DI GIOVANNI

vs.

BRYAN K. DOEHR

Superior Court, Judicial District of NEW HAVEN

G.A. 7 at MERIDEN

APRIL 12, 1988

APPEARANCE

Please enter the appearance of

LAW OFFICES OF IRVING J. PINSKY
P.O. BOX 1469, NEW HAVEN, CT 06506
Juris Number 101271, Telephone Number (203) 624-3175

in the above entitled case for

The Defendant

Signed Irving J. Pinsky
Irving J. Pinsky

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

EILEEN FEDOWITZ ET AL :

VS. :

CIVIL NO. N-88-338 WWE

JOSEPH GOLDEN INSURANCE AGENCY, INC. ET ALS :

:

ANSWER OF THE DEFENDANT, JOHN F. DI GIOVANNI

This defendant denies the material allegations contained in paragraphs 1, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 of the plaintiff's complaint.

This defendant admits the material allegations contained in Paragraphs 5 as it pertains to him, and 23 of the plaintiff's complaint.

With respect to Paragraphs 2, 3, 4 and 35 of the plaintiffs complaint, this defendant does not have sufficient knowledge upon which to form or base a belief and therefore leaves the plaintiff to his proof.

The factual allegations relating to the plaintiffs Pinsky and Fedowitz contained in paragraphs 6 through 22 of the plaintiffs complaint do not apply to this defendant and thus he will not plead to said allegations.

AFFIRMATIVE DEFENSE OF THE DEFENDANT, JOHN F. DI GIOVANNI

At the time of the serving of process in the matter of DiGiovanni vs. Brian K. Doehr returnable to the Superior Court for the Judicial District of New Haven, at Meriden, DiGiovanni furnished notice to said Doehr as to his rights

with relation to the prejudgment remedy in accordance with Exhibit "A" attached hereto.

An appearance in said court in behalf of Doehr was entered by one Attorney Irving J. Pinsky who, to the date of this pleading, has never applied for a hearing for the purpose of objecting to the prejudgment remedy complained of, all in accordance with the provisions of Section 52-278 e (b) of the Connecticut General Statutes.

THE DEFENDANT,
JOHN F. DI GIOVANNI

BY: /s/ Joseph P. Patrucco
Joseph P. Patrucco
his Attorney

EXHIBIT "A"

RETURN DATE: APRIL 19, 1988 SUPERIOR COURT

JOHN F. DI GIOVANNI JUDICIAL DISTRICT OF NEW HAVEN

VS. AT MERIDEN

BRIAN K. DOEHR MARCH 15, 1988

NOTICE TO DEFENDANT

You have rights specified in the Connecticut General Statutes, including Chapter 903 a, which you may wish to exercise concerning this prejudgment remedy. These rights include: (1) The right to a hearing to object to the prejudgment remedy for lack of probable cause to sustain the claim; (2) The right to a hearing to request that the prejudgment remedy be modified, vacated or dismissed or that a bond be substituted; and (3) the right to a hearing as to any portion of the property attached which you claim is exempt from execution.

THE PLAINTIFF

BY: /s/ Joseph P. Patrucco
JOSEPH P. PATRUCCO
HIS ATTORNEY

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Roland Pinsky, Jennie Pinsky
Eileen Fedowitz, Brian K. Doehr

v. Docket No. N-88-339 (WWE)

Richard K. Duncan
Joseph Golden Ins. Agency Inc.
John F. Di Giovanni

NOTICE OF APPEAL

1. Pursuant to Fed. R. App. P. 4(a)(1), Richard Pinsky, Jennie Pinsky, Eileen Fedowitz, Brian K. Doehr hereby gives notice and appeals to the United States Court of Appeals for the Second Circuit from the following judgment or order (describe the judgment or order): Granting summary judgment to each defendant and denying summary judgment to each plaintiff.

2. The judgment/order in this action was entered on Feb. 21 1989.

signature: /s/ Joanne S. Faulkner
address: 123 Avon St
New Haven CT 06511

date: 3/6/89

United States Court of Appeals
FOR THE SECOND CIRCUIT

FILED MAY 2 1990

ROLAND PINSKY, et al. 89-7521

v.

RICHARD DUNCAN, et al.

NOTICE OF MOTION
for Stay of Mandate
Pending Filing Petition
for Writ of Certiorari

MOTION BY:
Andrew M. Calamari
2429 Hering Ave.
Bronx, N.Y. 10469
(212) 655-3636

OPPOSING COUNSEL:
Joanne S. Faulkner
123 Avon St.,
New Haven, CT 06511
(203) 772-0395

Intervenor: Atty. Gen., State of Conn., Att: Henry Cohn
55 Elm St., Hartford, CT 06106—(203) 566-4990

Has consent of opposing counsel:
A. been sought? No
B. been obtained? No
Has service been effected? Yes
Is oral argument desired? No
(Substantive motions only)

Brief statement of the relief requested:
Stay of Mandate pending filing petition for writ of certiorari with U.S. Supreme Court.

By: /s/ Andrew M. Calamari
Andrew M. Calamari

Appearing for:
Defendant Appellee
Di Giovanni

May 1, 1990

Appellee or Respondent:
Defendant

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied

FILED MAY 7 1990

/s/ George C. Pratt
/s/ Jon O. Newman
/s/ J. Daniel Mahoney
Circuit Judge

No. 90-143

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DiGIOVANNI,
Petitioners,

v.

BRIAN K. DOEHR,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Petitioners:

State of Connecticut:

CLARINE NARDI RIDDLE
ATTORNEY GENERAL OF THE
STATE OF CONNECTICUT

ARNOLD B. FEIGIN
CAROLYN K. QUERIJERO
HENRY S. COHN*
Assistant Attorneys General
P.O. Box 120
Hartford, Connecticut 06101
Telephone: (203) 566-4990

John F. DiGiovanni:

ANDREW M. CALAMARI
2429 Hering Avenue
Bronx, New York 10469
Telephone: (212) 655-3636

*Counsel of Record

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East Hartford, CT 06108
528-4284

QUESTION PRESENTED

Whether the Connecticut *ex parte* attachment of real estate statute, which provides for a pre-attachment, probable cause determination by a state court judge, based upon a factual affidavit; a prompt post-attachment hearing; and an immediate appeal, satisfies the due process requirements of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

In the United States District Court for the District of Connecticut the plaintiffs were Roland Pinsky, Jennie Pinsky, Eileen Fedowitz and Brian K. Doehr. The defendants were Richard K. Duncan, Joseph Golden Insurance Agency, Inc. and John F. DiGiovanni.

At the time of the Second Circuit decision, Roland Pinsky, Jennie Pinsky, Eileen Fedowitz, Richard K. Duncan and Joseph Golden Insurance Agency did not continue to participate in this litigation. Therefore they are not named as parties herein.

Intervention by the State of Connecticut as a party was permitted by the Second Circuit subsequent to oral argument therein. The only proper parties to this case at this time are petitioners State of Connecticut and John F. DiGiovanni and respondent Brian K. Doehr.

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No. 90-143

In The

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v.

BRIAN K. DOEHR,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS OF THE COURTS BELOW

The original Judgment and Opinion of the United States Court of Appeals for the Second Circuit is reported at 898 F.2d 852 (2d Cir. 1990) *sub nom. Pinsky v. Duncan* and is printed in the appendix to the Petition for Certiorari at Pet. App. 1A.[1] A ruling issued on April 25, 1990, granting in part and denying in part petitions for rehearing, and amending

[1] Material contained in the Joint Appendix is cited herein as "J.A. ____." Material contained in the Appendix to the Petition for a Writ of Certiorari is cited as "Pet. App. ____." The Second Circuit opinion herein is cited as *"Pinsky."*

the original judgment, is printed at Pet. App. 32A. An order refusing a suggestion for rehearing in banc was entered by the Second Circuit on May 30, 1990. Pet. App. 35A.

A modification of the ruling on Petitions for Rehearing was issued on June 25, 1990. Pet. App. 36A. An amended opinion on the Petitions, consolidating the Second Circuit's prior opinions of April 25, 1990, and June 25, 1990, was subsequently issued. Pet. App. 37A.

The memorandum of decision of the United States District Court for the District of Connecticut, Eginton J., of February 17, 1989, is reported at 716 F. Supp. 58 (D. Conn. 1989). A copy of the opinion is printed in Pet. App. 40A.

The District Court directed the entry of judgment for the defendants in that decision. Judgment was entered on February 21, 1989, and is printed in Pet. App. 45A.

JURISDICTION

The original judgment and the opinion of the United States Court of Appeals for the Second Circuit were made and entered on March 9, 1990, and copies are printed in Pet. App. 1A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Petition for Certiorari was filed within ninety days of the ruling of partial grant and partial denial of petitioners' timely petitions for rehearing, issued by the Court of Appeals on April 25, 1990, which amended the original judgment of the Court. Pet. App. 32A. Supreme Court Rule 13.4. *Missouri v. Jenkins*, ____ U.S. ____, 110 S. Ct. 1651, 1660 (1990). *See also* 28 U.S.C. § 2101(c). This Court granted the Petition for Certiorari on October 1, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions. U.S. Const. Amend. XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Conn. Gen. Stat. § 52-278e(a)(1):

> **Allowance of prejudgment remedy without hearing. Notice to defendant. Subsequent hearing and order.** (a) The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 52-278c and 52-278d upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property. . .

STATEMENT OF THE CASE

This petition arises from a civil action filed in the United States District Court for the District of Connecticut seeking, on federal due process grounds, to invalidate Conn. Gen. Stat. § 52-278e(a)(1),[2] the Connecticut prejudgment attachment of real estate statute. Jurisdiction was claimed in the District Court under 28 U.S.C. § 1331 and § 1343.

The District Court proceeding resulted from a Connecticut Superior Court civil action commenced on March 15, 1988. In the Superior Court for the Judicial District of New Haven at Meriden, John F. DiGiovanni ("DiGiovanni or Petitioner DiGiovanni") brought an action against Brian K. Doehr ("Doehr or Respondent Doehr") for an alleged assault and battery. J.A. 28A.

At the same time as the Superior Court action was instituted, and to secure the defendant's assets in the event of judgment, DiGiovanni applied for an attachment on real property of Doehr in the amount of $75,000. Pursuant to Conn. Gen. Stat. § 52-278c(a), DiGiovanni presented a judge of the Superior Court with the following: (1) an unsigned "writ, summons and complaint" setting forth his cause of action for assault and battery; (2) an application for prejudgment remedy reciting that the "prejudgment remedy requested is for an attachment of real property;" and (3) a factual affidavit of DiGiovanni demonstrating probable cause that judgment would be rendered in his favor. J.A. 23A. Pursuant to § 52-278e(a)(1), a judge of the Superior Court reviewed DiGiovanni's papers, made a finding of probable cause, and on March 17, 1988, granted the prejudgment remedy against Doehr's realty to the extent of $75,000. J.A. 26A.

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[2] For the Court's convenience, the entire chapter 903a of the Connecticut General Statutes, Revised to 1989, entitled "Prejudgment Remedies," is set forth in Pet. App. 54A through 64A. The statute at issue herein — § 52-278e(a)(1) — is found in this chapter.

Service of the attachment and complaint was made upon Doehr immediately thereafter. At that time, Doehr was given notice pursuant to § 52-278e(b) that he had a right to seek a hearing to argue that the prejudgment remedy lacked probable cause or that it should be modified or vacated. He was also informed of his right to substitute a bond and to claim exemption from execution. J.A. 30A.

Instead of taking either of these courses, Doehr, who *did* have counsel in the Superior Court, on August 8, 1988, brought suit against DiGiovanni in the United States District Court for the District of Connecticut, contending that § 52-278e(a)(1) was unconstitutional under the due process clause of the Fourteenth Amendment.[3]

Both plaintiff Doehr and defendant DiGiovanni moved for summary judgment in the District Court. J.A. 13A, 19A. The only "material facts" produced by plaintiff Doehr in accordance with Rule 56, Federal Rules of Civil Procedure and District Court local rule 9(c) were that (1) DiGiovanni had sued Doehr in state court, and (2) DiGiovanni was permitted an *ex parte* real estate attachment pursuant to § 52-278e(a)(1). J.A. 14A.

On February 16, 1989, the District Court, in response to this *facial* attack on the statute's constitutionality, granted judgment for Petitioner DiGiovanni. The statutory scheme, the Court found, provided sufficient safeguards to protect a real property owner's due process rights. Pet. App. 43A, 716 F. Supp. 58, 60 (D. Conn. 1989).

Doehr appealed this decision to the United States Court of Appeals for the Second Circuit. Jurisdiction for this appeal

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[3] Three other plaintiffs joined Doehr, challenging § 52-278e(a)(1) out of wholly separate instances of attachment by different defendants. As indicated in the List of Parties, these other plaintiffs and defendants did not participate in the Court of Appeals for the Second Circuit and are not parties herein.

was based upon 28 U.S.C. § 1291. After oral argument the Second Circuit invited intervention by the State of Connecticut under 28 U.S.C. § 2403(b).

On March 9, 1990, the Second Circuit reversed in a decision containing three opinions. Judge Pratt concluded for the Court that § 52-278e(a)(1) was unconstitutional in violation of due process because the statute permits attachments without prior notice and hearing in the absence of "extraordinary circumstances" and separately found unconstitutionality because the attaching party is not required to post an attachment bond. 898 F.2d at 858. Pet. App. 15A-16A.

Judge Mahoney, who found the conclusion "not entirely free from doubt," 898 F.2d at 859, Pet. App. 17A, concurred only in Judge Pratt's rationale regarding the lack of notice and hearing. He did not agree that a lack of a bond was a due process violation, as there were civil remedies which a debtor might pursue to recover for wrongful attachment. 898 F.2d at 860, Pet. App. 17A.

Judge Newman concluded in dissent that § 52-278e(a)(1) entirely satisfied due process, citing a unanimous opinion of the Connecticut Supreme Court and three individual United States District Court decisions from Connecticut to support his view. 898 F.2d at 864, Pet. App. 31A.

In response to timely petitions for rehearing filed by petitioners, the Second Circuit, on April 25, 1990, granted the petitions to the extent of making its March 9, 1990, holding prospective in effect. The remainder of the relief sought in the petitions was denied. Pet. App. 32A. On June 25, 1990, the Court modified its April 25, 1990, ruling to make the original opinion retroactive to cases challenging the constitutionality of the Connecticut statute filed prior to March 9, 1990, and still pending on that date. Pet. App. 36A.

SUMMARY OF ARGUMENT

Chief Justice Rehnquist has observed that a court should disdain empanelling "a roving commission" to survey the statute books, striking down state laws on mere "musings" and in hypothetical situations. *Secretary of the State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 976 (1984).

Yet this is precisely the result of the holding of the Second Circuit in this case. The Court of Appeals has invalidated a Connecticut statute which allows real estate to be attached *ex parte*, but only on a determination of probable cause by a judge before attachment and with a right to an immediate hearing thereafter. Without the slightest indication of harm to respondent, who did not even attempt to avail himself of the protections afforded him by the statute, the Court of Appeals has concluded that there is a due process deprivation of property rights in *all* instances, merely because a full evidentiary hearing is not provided prior to attachment. This holding is overly restrictive and is not in keeping with precedent.

The petitioners' argument revolves around three key points. First, the hearing requirement of due process is a flexible one which does not always require a pre-deprivation hearing.

> "[W]here the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required.

Zinermon v. Burch, ____ U.S. ____, 110 S. Ct. 975, 984 (1990) (quoting *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 19 (1978)).

This Court has suggested that the proper test for judging procedural due process violations, such as the right to a prior hearing, is to be found in *Mathews v. Eldridge*, 424 U.S. 319

(1976). The Connecticut statute passes this test. The interest of the property owner is only a temporary cloud on his title which might affect his ability to transfer his realty. On the other hand, the risk of an erroneous deprivation has been minimized by the safeguards provided by the statute: a probable cause determination by a judge before attachment, based on a factual affidavit; an immediate full hearing upon request subsequent to attachment in which the probable cause finding may be reversed and the attachment dissolved; and an immediate appeal. These safeguards satisfy the *Mathews* Court's concerns. No substantial additional protections would be obtained by the additional requirement of a prior hearing.

Next, an examination of the four leading prejudgment attachment cases in this Court, all of which concerned personalty, provide support for petitioners' position. *See Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969) (wage garnishment illegal without prior hearing); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (replevin statutes unconstitutional as they allow seizure of chattels without hearing); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (sequestration statute constitutional where there were safeguards including judicial control of the process); and *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601 (1975) (garnishment statute which allowed seizure of bank account without "early hearing" unconstitutional).

Taken as a whole, these four cases illustrate that normally there is no need for a prior hearing under the due process clause where there exist "saving characteristics" to protect the debtor. All of these characteristics may be found in Connecticut's prejudgment remedy statute.

Finally, petitioners ask this Court to approve what many of the Circuit Courts of Appeals have previously indicated: that under *Mitchell* and *DiChem*, the *Fuentes* rule — which appeared to require extraordinary circumstances, such as national emergency, before creditors could attached *ex parte* — has been replaced by a more balanced test which now looks to the measures taken under state law to safeguard the property owners.

ARGUMENT

I. CONNECTICUT'S PROCEDURE FOR ATTACHMENT OF REALTY SATISFIES DUE PROCESS BECAUSE OF THE STATUTORY SAFEGUARDS PROVIDED.

A. THE DUE PROCESS HEARING REQUIREMENTS.

The strictures of the due process clause[4] call for a hearing before one is *finally* deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974). The hearing required to satisfy due process must be given "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

[4] The Ninth Circuit and some District Courts have held that the due process clause is not applicable at all to real estate attachments due to the limited nature of the interference with property rights. *See Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505 (9th Cir. 1975), *cert. denied sub nom. Hansen v. Weyerhaeuser Co.*, 425 U.S. 907 (1976); *Central Sec. Nat. Bank v. Royal Homes, Inc.*, 371 F. Supp. 476 (E.D. Mich. 1974); *In re Oronoka*, 393 F. Supp. 1311 (D. Maine 1975). This approach relies upon this Court's summary affirmance in *Spielman-Fond, Inc. v. Hanson's Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd* 417 U.S. 901 (1974) (no due process protection in the placing of a mechanics lien). The Court in *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1323 (3rd Cir. 1982) has pointed out that *Spielman-Fond* has not been undercut by subsequent decisions of this Court. *See also B & P Development v. Walker*, 420 F. Supp. 704 (W.D. Pa. 1976). The concurring and dissenting judges in *Pinsky* believed that the due process clause called for *some* degree of protection for the property owner. 898 F.2d at 859, 862, Pet. App. 17A, 26A.

The clause does not mandate, however, a pre-deprivation hearing in all cases.[5] Rather due process "is flexible and calls for such procedural protections as the particular situation demands . . . [N]ot all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Thus, just this last term, this Court in *Zinermon v. Burch*, ___ U.S. ___, 110 S. Ct. 975, 984 (1990) (quoting *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 19 (1978)), declared as regards the timing of hearing:

> "[W]here the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination" a prior hearing may not be required.

See also Ingraham v. Wright, 430 U.S. 651, 678-680 (1977) (prior hearing not required where there are other adequate protections).[6]

Citing much of the above precedent, this Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) set forth the following test[7] to determine whether a procedural due process

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[5] The inflexible approach of the Second Circuit majority in *Pinsky* is clearly erroneous. It requires a prior hearing in virtually *all* instances, regardless of safeguards provided or absence of harm to the debtor. 898 F.2d at 854, Pet. App. 7A.

[6] One writer has summarized this precedent as follows: "Recently, however, even in cases where there were *no* conflicting rights in the 'life, liberty, or property' for which an individual sought protection by means of a prior hearing, the Supreme Court has indicated a reduced concern about the intrinsic and instrumental benefits of a prior as opposed to a subsequent hearing . . . so long as the alternative procedures offered by the government are shown to produce substantially accurate results." (Emphasis in original.) L. Tribe, *American Constitutional Law* (2d ed. 1988) at 724.

[7] This test was employed by a thoughtful District Court opinion upholding the constitutionality of § 52-278e(a)(1), *Shaumyan v. O'Neill*, 716 F. Supp. 65 (D. Conn. 1989) and by both the Court and dissenting judges in *Pinsky*, 898 F.2d at 856, 863, Pet. App. at 10A, 28A.

violation, including the failure to afford a pre-attachment hearing, might have occurred:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

As demonstrated below, Connecticut's real estate attachment mechanism satisfies this test as well as the approach to due process taken in other opinions of this Court.

B. CONNECTICUT'S PREJUDGMENT REMEDY STATUTE FOR REAL ESTATE SATISFIES PROCEDURAL DUE PROCESS.

A mechanism to obtain a prejudgment real estate attachment has existed in Connecticut since colonial times.[8] Although earlier statutes permitted attachment merely on an attorney's signature,[9] the current statute sets forth numerous protections to meet due process concerns.

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[8] The process of serving the defendant with a writ of attachment and leaving a copy of the writ with the town clerk where the land lies is mentioned by Zephaniah Swift in his *System of the Laws of the State of Connecticut*, Vol. II, page 190 (1796). *See also Barber v. Morgan*, 84 Conn. 618, 622, 80 A. 791 (1911).

[9] *See E.J. Hansen Elevator, Inc. v. Stoll*, 167 Conn. 623, 356 A.2d 893 (1975). This procedure was terminated by the state legislature after this Court's decision in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) (challenge to garnishment without notice may be pursued under the civil rights laws).

In his dissent in *Pinsky*, Judge Newman accurately describes the provisions of the Connecticut law as follows:

> Connecticut permits any person starting a lawsuit to file on the land records an attachment of the real property of the defendant. Conn. Gen. Stat. § 52-278e(a)(1). This prejudgment remedy assures the plaintiff a source of funds in the event the lawsuit is successful. To obtain this attachment the plaintiff must present sworn evidence sufficient to persuade a state court judge at an ex parte hearing that probable cause exists to believe that the lawsuit will be successful. *Id.* If an attachment is permitted, the defendant is entitled to an "expeditious" adversary hearing at which the attachment will be dissolved unless the plaintiff establishes probable cause in the context of an adversary hearing. *Id.* § 52-278e. Connecticut permits appellate review of an order denying a motion to dissolve an attachment. *Id.* § 52-278l(a). To assure that a defendant becomes aware of his right to challenge an ex parte real estate attachment, Connecticut requires the attaching plaintiff to serve the defendant with notice of his right to a hearing to challenge the claim of probable cause, to request that the attachment be vacated or modified, or that a bond be substituted, or to claim exemption from attachment. *Id.* § 52-278e(b). Connecticut also permits a defendant to recover double damages for commencing a civil lawsuit without probable cause. *Id.* § 52-568(a)(1) (West Supp. 1989).

898 F.2d at 861-862, Pet. App. at 24A-25A.[10]

The present facial challenge to this statutory scheme is without merit. Under the *Mathews* balancing test, the interest to be protected — *i.e.*, the owner's interest in his property — is not seriously affected by the postponement of

[10]The entire chapter is set forth at Pet. App. 54A-64A.

an adversary hearing to immediately after the placing of an attachment lien on the land records. Unlike the situation where personal property is seized, in the present case there is *no* physical invasion of the property at interest at all. In fact, the filing of an attachment lien on the land records results in no interference with the property owner's use and enjoyment of his realty.

At most, such an attachment creates a temporary cloud on the title, which would affect the owner at all *only* if he intended to market the property at the time the attachment was placed. Even in that instance, Connecticut provides that such an owner can post a bond in court or substitute other property or place funds in escrow in order to release the attachment and sell the property.[11]

Since the Connecticut statute already provides for an immediate post attachment hearing at which the attachment may be reduced or dissolved, the sole possible "deprivation" for the landowner is a temporary impairment of his ability to transfer title outright for the brief period between the time the attachment is placed and the time of the hearing immediately thereafter. As Judge Newman said in dissent in *Pinsky*:

> The Due Process Clause is not a code of civil procedure. It assures that no state will "deprive" any person of "property" without "due process of law." U.S. Const. amend. XIV. An ex parte prejudgment attachment of real estate does not deprive the owner of any possessory rights in his property. At most, it impairs the market value of the property during the brief interval between the ex parte attachment and the "expeditious" adversary hearing required by state law. If the owner has no plans to sell the property or borrow upon it during that interval, the ex parte attachment has caused him no adverse

[11]On posting bond or substitution of other property, *see* Conn. Gen. Stats. § 52-278e(b) and § 52-304.

> consequence. If, during that interval, he wishes to realize the full market value of his property, he may replace the attachment with a bond.

898 F.2d at 862, Pet. App. 25A-26A (footnote omitted).

In any event, respondent Doehr has not claimed or established any harm herein. Indeed, he never even requested a hearing in Superior Court in order to vacate the attachment under the statutory mechanism. Instead he brought this constitutional challenge to the statute directly in Federal District Court.

Under the second *Mathews* factor, Connecticut has established elaborate safeguards to protect the attached party and substantially reduce the risk of an erroneous deprivation, including an independent determination of probable cause by a Superior Court judge based on a factual affidavit, and an immediate post-attachment adversary hearing. These standards should also fulfill the third point of *Mathews*. The public interest is satisfied by even-handed legislation which allows a creditor or other claimant to obtain a remedy through the state court system and at the same time provides protection from arbitrary action or from imposition of serious harm on the affected party.

The further imposition of prior notice and evidentiary hearing would not significantly improve the protection for the debtor, and could result in harm to a legitimate creditor if the debtor managed to transfer title to his property after receiving notice of the proposed attachment, but before the hearing was held. The present statutory scheme serves the legitimate interests of both sides and, as such, satisfies the requirements of due process.

This Court has previously upheld, moreover, a virtually identical Connecticut statute which permits a lis pendens to be placed *ex parte* upon the land records, followed by an immediate hearing if requested by the landowner. Conn. Gen.

Stat. §§ 52-325, 52-325a, 52-325b were initially sustained by the Connecticut Supreme Court in *Williams v. Bartlett,* 189 Conn. 471, 457 A.2d 290 (1983). The Connecticut court had sustained these statutes, not on the grounds of any specific interest a creditor may have in the realty,[12] but by applying the *Mathews* test finding that "the minimum requirements of procedural due process" had been met. *Id.* 189 Conn. at 480-481, 457 A.2d at 294-295.

On appeal, the question presented to this Court was stated as follows:

> Is Fourteenth Amendment procedural due process satisfied when only protection afforded owner of land sequestered under lis pendens statute is post-sequestration hearing?

See 52 U.S. Law Week 3036 (August 2, 1983). This Court summarily affirmed by dismissing the appeal. *Bartlett v. Williams,* 464 U.S. 801 (1983). In the case of both lis pendens and real estate attachments, the interference with an interest is identical (marketability is affected), and the interference with enjoyment is not so severe that a prior hearing is mandated.

The Connecticut statute thus satisfies the *Mathews v. Eldridge* test. *See also Zinermon, supra,* at 19.

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[12] *Cf.* Judge Mahoney in *Pinsky,* 898 F.2d at 860, Pet. App. at 20A.

II. THE COURT'S PRIOR DECISIONS REGARDING *EX PARTE* PREJUDGMENT REMEDIES SUSTAIN THE CONSTITUTIONALITY OF CONNECTICUT'S REAL ESTATE ATTACHMENT STATUTE.

This Court has on four separate occasions ruled on the constitutionality of *ex parte* attachments and like remedies. None of these decisions concern attachment of realty. They do point out, however, the differences between the degree of interference with property rights which existed in these prior cases involving personal property and that which occurs in this case. The four decisions of the Court, read as a whole, also set forth the safeguards needed to sustain personal property attachments. There is no reason why these safeguards should not be applicable to sustain *ex parte* real estate attachments as well.

The first of these cases — *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969) — struck down as violative of due process a Wisconsin law which froze wages until trial and did not allow a prior hearing. The Court was careful to note, however, that "[a] procedural rule that may satisfy due process for attachments in general, see McKay v. Innes, 279 U.S. 820, does not necessarily satisfy procedural due process in every case." *Id.* at 340.

In *Sniadach*, the prior hearing was compelled by the fact that *wages* were at issue — "a specialized type of property presenting distinct problems in our economic system." *Id.* The wage earner might be driven "to the wall" by a prejudgment garnishment. *Id.* at 342.[13] A real estate attachment, which involves no physical removal of the property at all, is hardly analogous. *Sniadach*, taken alone, thus provides no direct precedent for striking down Connecticut's statute.

[13]A prejudgment attachment of wages is entirely prohibited in Connecticut. *See* Conn. P.A. 90-149 (eff. October 1, 1990) attached as an appendix to this brief.

The second case decided by this Court, relied upon heavily by the majority in *Pinsky*,[14] is *Fuentes v. Shevin*, 407 U.S. 67 (1972). In *Fuentes*, decided in the absence of two justices on a 4-3 vote, the Court struck down replevin statutes because "they deny the right to prior opportunity to be heard before chattels are *taken* from their possessor." (Emphasis added.) *Id.* at 96. In one instance a creditor had repossessed a stove and stereo; in another a bed, a table, and other household goods. *Id.* at 70, 71. These seizures were especially harsh, the Court noted, because the goods were "dearly bought and protected by contract . . . ." *Id.* at 86. This is hardly the situation with a prejudgment real estate attachment which results in *no* physical deprivation of property at all.

The extent of *Fuentes* was limited just two years later in *Mitchell v. W.T. Grant Company*, 416 U.S. 600 (1974).[15] The *Mitchell* court had before it a statute allowing the sequestration of a debtor's property from the commencement of the action until after trial. Acknowledging the flexibility of the due process analysis, the Court sustained the Louisiana statute. Indeed "[t]he usual rule has been '[w]here only property rights are involved, mere postponement of the judicial enquiry is not denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' " *Id.* at 611, quoting *Phillips v. Commissioner*, 283 U.S. 589, 596-7 (1931).

Unlike the statute in *Fuentes*, the *Mitchell* statute had several protective measures — an affidavit requiring a statement of specific facts, not generalities; judicial control of the process "from beginning to end;" the right to sue for damages if wrongly issued; and the right to a post-seizure hearing.

[14]*See, e.g.*, 898 F.2d at 854, Pet. App. at 7A.

[15]Justice Powell nicely summarizes *Fuentes* in *Mathews, supra* at 335, as follows: "[T]he Court only said that in a replevin suit between two private parties the initial determination required something more than an *ex parte* proceeding before a court clerk."

When *Fuentes* was again cited in *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601 (1975), it was used along with *Mitchell* to strike down a Georgia garnishment statute which "ha[d] none of the saving characteristics of the Louisiana statute." *Id.* at 607.

> Here, a bank account, surely a form of property, was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer. *Id.*

Connecticut's real estate prejudgment remedy statute at issue, § 52-278e(a)(1), does not involve the harm of total deprivation which occurs in a physical seizure of personal property. The statute, in any event, meets the standards of both *Mitchell* and *DiChem*. Connecticut, in fact, has attempted, in enacting § 52-278e, to follow the *DiChem* holding.[16] In this regard, one need only look to the language of the Connecticut Supreme Court in *Fermont Div., Dynamics Corp. of America v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979) which exactly tracks *DiChem* in finding the statute constitutional.[17]

Justice Peters[18] declared:

> Section 52-278e exhibits *all the saving characteristics* that the law of procedural due process requires. The statute provides for adequate judicial supervision of the entire process of seizure, and does not permit writs to be issued by a court clerk. The statute can be invoked only by a verified affidavit that contains factual, rather than merely conclusory, supporting allegations. Most important, the statute affords to the defendant whose property has been attached the opportunity to obtain an immediate postseizure hearing at which the prejudgment remedy will be dissolved unless the moving party proves probable cause to sustain the validity of his claim.

Id. at 396-398, 423 A.2d at 83. (Emphasis added.)

To the *Fermont* Court the lack of a prior hearing is not fatal where these safeguards exist. *Id.*[19]

Under the line of this Court's attachment decisions, the Connecticut statutory scheme passes constitutional muster.

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[16]In *Mitchell* this Court also showed concern that the sequestration process not be abused by noting the shared interest of debtor and creditor in the property. This factor does not appear in the list set forth in *DiChem*. Moreover the numerous safeguards of the Connecticut statute are adequate to protect the property owner in the context of Connecticut's real estate attachment procedure.

The Court in *Pinsky* opined that a difference might be found between the earlier attachment statutes and Connecticut's statute because Connecticut's statute allowed a remedy for a tort claimant. But there has been no showing that the probable cause review and subsequent hearing will not on its face function correctly in the context of a tort. Judges regularly make findings of probable cause in the course of their criminal function.

[17]As stated earlier, prior to 1973, real estate attachments were issued by attorneys as commissioners of the Superior Court at the commencement of suit without notice. In 1973 the Connecticut General Assembly enacted legislation mandating a prior hearing in all instances. P.A. 73-431, § 5. In 1976, following *DiChem*, the current statute was passed, obviating the prior hearing requirement for realty, provided the *DiChem* safeguards were met. P.A. 76-401, § 2.

[18]Honorable Ellen Ash Peters is now the Chief Justice of the Connecticut Supreme Court.

[19]Although a creditor's bond or other security is not a prerequisite to due process, it is noted that Connecticut law provides for double damages for wrongful attachment § 52-568(a). The claim for damages may be brought as a counterclaim to the suit seeking attachment. The concurring and dissenting judges in *Pinsky* held this sufficient protection, 898 F.2d 860, 864 Pet. App. 21A, 29A, and the respondent did not seek review of that holding.

III. THERE IS NO REQUIREMENT FOR A PRIOR HEARING IN ALL CASES EXCEPT FOR EXTRAORDINARY CIRCUMSTANCES.

The Respondent has argued, and the majority below agreed that, in Judge Pratt's words, "a prior hearing may be postponed [only] where exceptional circumstances justify such a delay, *and where* sufficient additional safeguards are presented." 898 F.2d at 855, Pet. App. 8A (emphasis in original). The exceptional circumstances recognized by the fragmented *Pinsky* court include action taken in national emergencies or the seizing of misbranded drugs. *Id.* This view is clearly a wrong interpretation of procedural due process.

The approach of the Second Circuit in *Pinsky* is drawn from *Fuentes* alone without consideration of the subsequent cases of *Mitchell* and *DiChem, supra. Mitchell* did not mention extraordinary circumstances in sustaining the Louisiana statute, nor did *DiChem* fault the Georgia statute on the ground that it permitted seizures in *any* situation without a prior hearing.

Indeed *DiChem* is careful to emphasize that the hearing required is an "early" one, not a prior one, *DiChem* at 606, which is precisely what the Connecticut statute provides. Again *DiChem* stresses that the debtor was entitled to notice and a hearing "*or* other safeguard" in connection with the seizure. *Id.* (emphasis added).

The approach, post *Fuentes*, is to concentrate on the *safeguards* available at the time of the deprivation. The "sine qua non" prior hearing rationale of *Fuentes* is inappropriate

even to the actual seizure of personalty and more so to attachment of realty.[20]

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[20]Numerous federal courts have held that *Fuentes* has been modified by subsequent cases. *See, e.g., Jonnet v. Sav. Bank of the City of New York*, 530 F.2d 1123 (3rd Cir. 1976) (extraordinary circumstances not controlling); *Hutchinson v. Bank of North Carolina*, 392 F.Supp. 888, 895, note 8 (M.D.N.C. 1975) ("we feel that *Mitchell* and *DiChem* have repudiated *Fuentes* to the extent that a new (really traditional) approach to an analysis of due process has been developed and our decision reflects this new approach"); *Guzman v. Western State Bank of Devils Lake*, 516 F.2d 125, 128 (8th Cir. 1975) (*Fuentes* limited by *Mitchell*); *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 535, n.16 (5th Cir. 1978) ("extraordinary circumstance" *not* mandated); *Matter of Northwest Homes of Chehalis, Inc., supra*, at 507 (*Mitchell* and *DiChem* establish standards to judge post-attachment hearing).

CONCLUSION

The Connecticut statute at issue, § 52-278e(a)(1), satisfies the *Mathews v. Eldridge* balancing test and includes the *DiChem* saving characteristics necessary to satisfy due process. No more is constitutionally required. Therefore, the opinion and judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.

Petitioner
STATE OF CONNECTICUT:

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

CAROLYN K. QUERIJERO
Assistant Attorney General

ARNOLD B. FEIGIN
Assistant Attorney General

HENRY S. COHN
Counsel of Record
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, Connecticut 06101
Telephone: (203) 566-4990

Petitioner
JOHN F. DIGIOVANNI:

ANDREW M. CALAMARI, ESQ.
2429 Hering Avenue
Bronx, New York 10469
Telephone: (212) 655-3636

November, 1990

No. 90-143

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DiGIOVANNI,
Petitioners,

v.

BRIAN K. DOEHR,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

Senate Bill No. 265
PUBLIC ACT NO. 90-149

AN ACT CONCERNING
PREJUDGMENT ATTACHMENT.

Section 1. Section 52-329 of the general statutes is repealed and the following is substituted in lieu thereof:

When the effects of the defendant in any PROPOSED OR PENDING civil action in which a judgment or decree for the payment of money may be rendered are concealed in the hands of his agent or trustee so that they cannot be found or attached, or when a debt OTHER THAN EARNINGS, AS DEFINED IN SUBDIVISION (5) OF SECTION 52-350a, is due from any person to such defendant, or when any debt, legacy or distributive share is or may become due to such defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ, subject to the provisions of sections 52-278a to 52-278g, inclusive, a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days before the return day, with such agent, trustee or debtor of the defendant, or, as the case may be, with the executor, administrator or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover.

Sec. 2. Section 52-278b of the general statutes is repealed and the following is substituted in lieu thereof:

Notwithstanding any provision of the general statutes to the contrary, no prejudgment remedy shall be available to

a person in any action at law or equity *(1)* unless he has complied with the provisions of sections 52-278a to 52-278g, inclusive, except an action upon a commercial transaction wherein the defendant has executed a waiver as provided in section 52-278f, OR (2) FOR THE GARNISHMENT OF EARNINGS AS DEFINED IN SUBDIVISION (5) OF SECTION 52-350a.

Sec. 3. Section 52-278e of the general statutes is amended by adding subsection (d) as follows:

(NEW) (d) No prejudgment remedy for the attachment of real property of a municipal officer may be granted pursuant to this section in any civil action against such officer for an act or omission, not malicious, wanton, wilful or ultra vires, on the part of such officer while acting in the discharge of his duties where such officer would be protected and held harmless from financial loss and expense under the provisions of section 7-101a.

[illegible]

[illegible] Court of the United States

October Term, 1990

STATE OF CONNECTICUT
JOHN F. DIGIOVANNI,

Petitioners,

v.

BRIAN K. DOEHR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR RESPONDENT

[illegible]
(Counsel of Record)
[illegible]
[illegible] CT 06511
[illegible]

[illegible]
[illegible]
[illegible] Litigation Group
[illegible]
[illegible] N.W.
[illegible] D.C. 20036
[illegible]

Attorneys for Respondent

[illegible]

QUESTION PRESENTED

May a State, consistent with the Due Process Clause, deprive an individual of the full use and enjoyment of his home, by authorizing a $75,000 public attachment on his real property at the request of a private party who has no prior interest in the property, without predeprivation notice or opportunity to be heard, without requiring the attaching plaintiff to post a bond, and without any showing of special need or other extraordinary circumstances?

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STATEMENT OF THE CASE

In March, 1988, pursuant to a subsection of Connecticut's Prejudgment Remedy (PJR) law, Conn. Gen. Stat. § 52-278e(a)(1), petitioner DiGiovanni attached respondent Doehr's home based on an ex parte application and affidavit submitted "on the papers." As authorized by the statute, he effected the attachment before the inception of his civil lawsuit against Doehr for assault and battery.[1] The lawsuit did not involve the attached real estate; DiGiovanni had no preexisting interest in Doehr's home or in any other property owned by Doehr.

Doehr had no prior notice or opportunity to be heard before his property was attached. DiGiovanni did not, and was not statutorily required to, post a bond for damages in the event the attachment was wrongful.

The PJR application recited DiGiovanni's intention to commence a lawsuit and sought an attachment of $75,000. No facts whatsoever were provided to support that amount. J.A. 24A.

DiGiovanni sought the ex parte attachment solely on the ground that the "remedy requested is for an attachment of real property." J.A. 23A; *see* Conn. Gen. Stat. § 52-278e(a)(1). DiGiovanni did not allege that Doehr would not, or could not, pay any eventual judgment. In short, he did not even show that he needed the security

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[1] Petitioners are mistaken in describing the attachment as having been obtained at the same time as the action was commenced. In Connecticut, an action is commenced when the suit is served. *Young v. Margiotta*, 136 Conn. 429, 433, 71 A.2d 924 (1950).

of an attachment, nor did he allege such exigent circumstances as would permit an ex parte PJR under Conn. Gen. Stat. § 52-278e(a)(2), a subsection not at issue in this case.

The ex parte affidavit recited, in conclusory fashion, only DiGiovanni's one-sided version of the underlying facts. The affidavit, dated March 16, 1988, asserted that three days earlier, "I was willfully, wantonly and maliciously assaulted by the defendant . . . . Said assault and battery [caused a broken wrist and bruised eye]. . . . I have . . . expended sums of money for medical care and treatment. . . . In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff." J.A. 24A.

The affidavit does not reveal such pertinent considerations as whether DiGiovanni provoked the altercation; whether either party was arrested in connection with the incident; or whether Doehr was also injured and could assert a counterclaim.

Ordinarily, upon presentation of an application for attachment, the clerk checks the papers for proper form and presents them to a judge for signature. On March 17, 1988, a judge signed the order that had been presented to the clerk by DiGiovanni which contained little more than the pro forma recital, "[I]t is found that there is probable cause to sustain the validity of the plaintiff's claim, [and] that the application should be granted ex parte because the prejudgment remedy requested is for an attachment of real property." J.A. 26A.

The sheriff attached the property on March 21; only after attaching his property did he make service on

Doehr. The complaint had a "return date" of a month later, April 19, 1988, J.A. 27A, the date when the defendant must appear and when pleadings and discovery may begin. That April 19 date was thus the first procedural opportunity for Doehr to move for a post-attachment hearing on the March 21 PJR. Before April 19, Doehr could challenge the attachment only by bringing a separate action with an order to show cause, necessarily incurring the expense of a separate filing fee and sheriff's fee.

As more fully described in petitioner's Statement of the Case, Doehr subsequently brought suit against DiGiovanni in the United States District Court for the District of Connecticut, alleging that his constitutional rights to due process and equal protection had been violated. J.A. 4A.

The district court ruled that Connecticut's PJR statute satisfied due process. *Pinsky v. Duncan*, 716 F. Supp. 58 (D. Conn. 1989). Doehr appealed, and prevailed in a divided opinion. *Pinsky v. Duncan*, 898 F.2d 852 (2d Cir. 1990).

SUMMARY OF ARGUMENT

Connecticut General Statutes § 52-278e(a)(1) is a unique prejudgment remedy (PJR) law because it enables a private plaintiff to deprive a potential defendant of the full enjoyment and use of his fundamental interest in the full ownership, use and disposition of real property by an attachment (1) without prior notice; (2) without predeprivation opportunity to be heard; (3) without posting a

bond to indemnify the defendant for any damage that he may suffer if the attachment is wrongful; (4) without any preexisting interest in the property; (5) when there are no exigent circumstances; and (6) with no guarantee of a prompt post-attachment hearing.

Because the attachment, pursuant to Conn. Gen. Stat. § 52-278e(a)(1), is predictable and because prior notice and hearing are eminently feasible, predeprivation process is the constitutional norm. *E.g., Zinermon v. Burch*, ___ U.S. ___, 110 S. Ct. 975, 990 (majority opinion); *accord* at 995-96 (dissenting opinion) (1990).

The right to transfer, or use the equity in, real property is a fundamental right. An attachment deprives the owner of significant and valuable incidents of ownership. Title becomes unmarketable, and any equity in the property becomes unavailable for use as security for home equity loans or lines of credit needed to meet essential family expenses, such as paying a lawyer, basic home maintenance, replacing an old car, paying tuition, or meeting medical expenses. Thus, an attachment lien can cause significant financial, physical, and emotional injury to the property owner, and to his or her dependents.

In these circumstances, predeprivation notice and opportunity to be heard is essential. "When protected interests are implicated, the right to some kind of prior hearing is paramount." *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).

No prior decision of this Court sanctions a PJR statute like Connecticut's. The case chiefly relied on by petitioners, *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), is distinguishable because it involves both a claim based on

a prior interest in the property and a statute requiring the plaintiff to post a bond.

The balancing test enunciated by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), mandates predeprivation notice and opportunity to be heard. The State has no interest in a private dispute; the plaintiff has no preexisting interest in defendant's property; the risk of an erroneous deprivation is considerable; and protecting a defendant's interest in his own real property is compelling. This case does not involve extraordinary circumstances requiring special protection to a state or creditor interest. The postdeprivation opportunity to litigate the wrongfulness of the attachment is tenuous at best, and wholly different from predeprivation protections designed to reduce the risk of erroneous deprivation, such as a bond.

Because the Connecticut law allows no predeprivation notice or hearing when the property to be attached is real estate, and because it does not require a bond to minimize the risk of erroneous deprivation, Conn. Gen. Stat. § 52-278e(a)(1) deprives the homeowner of due process.

ARGUMENT

CONNECTICUT'S EX PARTE ATTACHMENT LAW VIOLATES DUE PROCESS

I. THE ATTACHMENT DEPRIVES THE OWNER OF FUNDAMENTAL, CONSTITUTIONALLY PROTECTED, RIGHTS IN REAL PROPERTY

An attachment of real property is a serious infringement on a basic civil right: the right to use, enjoy, own, and dispose of property. *Sheiley v. Kraemer*, 334 U.S. 1, 10 (1948); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 544 (1972).

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, *a home*, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Id. at 552 (emphasis added).

Petitioners suggest that, because respondent could still live in his home, the deprivation of property was insignificant. But that view seriously understates the effect of an attachment on real property. "Attachment . . . is tantamount to an involuntary dispossession of the defendant prior to any adjudication of the rights of the plaintiff – an execution, so to speak, in advance of trial and judgment." Annotation, *Wrongful Attachment – Damages*, 45 A.L.R. 2d 1221 (1956).

"[R]eal estate attachments are critical encumbrances which materially impact upon the marketability of title." Widem, *Connecticut Real Estate Practice After Pinsky v. Duncan*, 1 Conn. Lawyer 9 (1990); *see Frank Towers Corp. v. Laviana*, 140 Conn. 45, 52-53, 97 A.2d 567, 571 (1953). Any transferee of the property takes subject to the lien. *City National Bank v. Traffic Engineering Assoc.*, 166 Conn. 195, 200-01, 348 A.2d 637 (1974); upon foreclosure, an attaching plaintiff gets paid, even if his claim is not reduced to judgment. Conn. Gen. Stat. § 49-27. If the defendant prevails, he has to sue to get his money back.

"A prejudgment attachment may deprive a litigant of a significant property interest for weeks, months, or years, depending on the complexity of the case and the backlog of the court's docket." *Diane Holly Corp. v. Bruno & Stillman Yacht Co.*, 559 F. Supp. 559, 561 (D.N.H. 1983). *See also Gerardi v. Statewide Ins. Co.*, No. N-86-266 (EBB) (D. Conn.) (lodged with the Clerk of this Court) (22 months to get hearing).

Prejudgment attachment is a remedy unknown to the common law, *Ledgebrook Condominium Ass'n v. Lusk Corp.*, 172 Conn. 577, 582, 376 A.2d 60 (1977), and unavailable in equity. *De Beers Mines v. United States*, 325 U.S. 212, 222-23 (1945); *In re Fredeman Litigation*, 843 F.2d 821 (5th Cir. 1988); High, *Injunctions* § 326 (4th ed. 1905) ("Any other rule than this would lead to unnecessary and often fruitless interruption of property rights by creditors at large whose demand might be utterly unfounded in law and incapable of being established by judgment").

Early PJR statutes were devised to obtain jurisdiction over nonresidents, but even that purpose is now circumscribed by due process considerations. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) ("[T]raditional notions of fair play and substantial justice can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage").

While an attachment does not inevitably interfere with the right to occupy the property, it does interfere with the right to use the equity in the property (to finance one's defense, to pay for home repairs, education, medical expenses, to buy a car, to move up to a more expensive home) and to dispose of the property. The Constitution protects all the essential attributes of property, including the right to use and dispose of it. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

"Maintenance of a lien upon property is not a negligible deprivation (citing *Sniadach*). . . . " *West v. Zurhorst*, 425 F.2d 919, 920 (2d Cir. 1970). *See also Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85 (1988) (the judgment lien impaired the owner's ability to mortgage or alienate the property; "state procedures for creating and enforcing such liens are subject to the strictures of due process"). *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (even when the taking deprives the owner of only a nonpossessory interest, such as the right to mortgage or sell, it is qualitatively more severe when the taking is by a stranger).

In 1971, only six states allowed non-emergency ex parte PJR attachments of real property. Note, *The Constitutionality of Real Estate Attachments*, 37 Wash. & Lee L. Rev. 701 n.1, 707 n.40 (1980). Now, Connecticut stands alone, undoubtedly because ex parte attachments of real property in non-emergency situations have been held unconstitutional in numerous cases. *E.g., Clement v. Four North State Street Corp.*, 360 F. Supp. 933 (D.N.H. 1973); *Idaho First Nat. Bank v. Rogers*, 41 U.S.L.W. 2492 (Idaho Dist. 1973); *Bay State Harness Horse Ass'n v. P.P.G. Ind.*, 365 F. Supp. 1299 (D. Mass. 1973); *Higley Hill, Inc. v. Knight*, 360 F. Supp. 203 (D. Mass. 1973); *Gunter v. Merchants Warren National Bank*, 360 F. Supp. 1085 (D. Me. 1973); *Terranova v. Avco Financial Services*, 396 F. Supp. 1402, 1407 (D. Vt. 1975); *Briere v. Agway, Inc.*, 425 F. Supp. 654 (D. Vt. 1977); *MPI, Inc. v. McCullough*, 463 F. Supp. 887 (D. Miss. 1978); *McIntyre v. Associates Financial S. Co.*, 367 Mass. 708, 328 N.E.2d 492, 494 (1975). *Cf. Gonzales v. County of Hidalgo*, 489 F.2d 1043 (5th Cir. 1973) (landlord-tenant).[2]

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[2] Petitioners or amici cite a few cases which decline to find that attachment of real property affects a constitutionally protected interest. Those cases concern either a preexisting interest in the property or significantly different statutes, which include protections to minimize the risk of wrongful deprivation lacking in Connecticut's PJR statute, such as a bond or exigent circumstances. *E.g., Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505 (9th Cir. 1975) (statute requires the attaching plaintiff to post a double bond and permits an ex parte attachment only in extraordinary circumstances); *see Thompson v. De Hart*, 84 Wash. 2d 931, 530 P.2d 272 (1975) (plaintiff must show a need for prompt action); *cf. Stone v. Godbehere*, 894 F.2d 1131, 1134 (9th Cir. 1990) ("A restraining

(Continued on following page)

A home is the biggest investment in a person's life, both financially and psychologically. "No property is more sacred than one's home. . . . " *Sentell v. New Orleans R. Co.*, 166 U.S. 698, 704-05 (1897); *Payton v. New York*, 445 U.S. 573, 585, 589-90, 597 n.45, 601 & n.54, 615 (1980). The ability to occupy one's home is only one of the fundamental incidents of ownership which the Constitution protects. The home has long been given special protection by the Court in connection with seizure; a nonpossessory taking, such as an attachment, is a form of seizure. *See Fuentes v. Shevin*, 407 U.S. 67, 91 n.23 (1972); *Bank of Lyons v. Schultz*, 78 Ill. 2d 235, 399 N.E.2d 1286, 1289 (1980); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

Even when there is a seizure by the government itself, to effectuate an important public purpose rather than for merely private advantage, the homeowner is entitled to prior notice and an opportunity to be heard. *E.g., United States v. The Premises at Livonia*, 889 F.2d 1258

(Continued from previous page)

order prohibiting the alienation of property does impose a significant injury"). Also, *Bustell v. Bustell*, 107 Mont. 457, 555 P.2d 722 (1976), *appeal dismissed*, 430 U.S. 925 (1977) (statute limited to contract actions, and required a double bond); *cf. First Bank Western Montana v. Gregoroff*, 770 P.2d 512 (1989) (a prehearing seizure may be obtained only under circumstances which indicate the plaintiff's remedy would be seriously impaired).

The cases cited by petitioners or amici simply do not stand for the proposition that a real property owner is relegated to second class citizenship when it comes to due process protections.

(2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (1990) (per curiam) (occupancy agreement); *United States v. Parcel I. Beginning At a Stake*, 731 F. Supp. 1348, 1354 (S.D. Ill. 1990) (occupancy agreement) ("Most importantly, the governmental interest in providing minimal due process is, in the balance, scant when compared with the claimants' overriding interest in their homes"); *United States v. Property at 850 S. Maple*, 743 F. Supp. 505, 510 (E.D. Mich. 1990) (leasehold; occupancy agreement after eviction); *United States v. Premises Located at Highway 13/5*, 747 F. Supp. 641 (N.D. Ala. 1990) (occupancy agreement).

> "The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . "

Boyd v. United States, 116 U.S. 616, 627 (1886) (quoting *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765)), cited in *Silverman v. United States*, 365 U.S. 505, 512 (1961).

Because property ownership is a basic civil right, the owner is entitled to due process before being deprived of any interest in that property. As discussed below, that process is not provided by Connecticut law.

II. CONNECTICUT LAW DENIED RESPONDENT DUE PROCESS

A. Basic Due Process Requirements Enunciated by the Court's Prior Decisions Have Not Been Met.

As set forth above, the attachment deprived respondent of constitutionally protected interests in owning,

using the equity in, and disposing of, his property. The question then becomes what process was due before that deprivation took place. The general rule is that, except in truly unusual circumstances, due process requires notice of the proposed deprivation before it takes place, and an opportunity to be heard before the deprivation. *Board of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

This Court has consistently held that, when a deprivation pursuant to an established state procedure is predictable, rather than unanticipated, and it is possible to provide prior notice and hearing, the State must do so. *E.g., Zinermon v. Burch*, ___ U.S. ___, 110 S. Ct. 975, 990 (majority), 995-96 (dissent) (1990); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *Parratt v. Taylor*, 451 U.S. 527, 537-38 (1981). Petitioners do not, and cannot, claim that a prior hearing is impracticable, especially since Connecticut has afforded notice and hearing for real property attachments since the decision below, *see* Amicus Brief at 15, and has long done so when the attachment is for personalty in nonexigent circumstances. Conn. Gen. Stat. § 52-278d.

Due process normally requires some opportunity to respond before the deprivation. *Memphis Light, Gas & Water Div.*, 436 U.S. 1, 16 (1978); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) ("[T]he right to a prior hearing . . . is the only truly effective safeguard against arbitrary deprivation of property"). *E.g., Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264-65 (1987) ("a meaningful opportunity to respond before a temporary deprivation may take effect entails, at a minimum, the right to be informed not only of the nature of the charges but also of the substance of

the relevant supporting evidence. If the [affected party] is not provided this information, the procedures . . . contain an unacceptable risk of erroneous decision").

Some of this Court's decisions allow delaying a full evidentiary hearing temporarily, (1) when there are at least some predeprivation administrative procedures, (2) where there is a substantial governmental interest, and (3) the risk of erroneous deprivation is low. Even those decisions require that the person being deprived of a property or liberty interest receive advance notice of the claims and the substance of the supporting evidence before even a temporary deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 339 (1976) (notice and extensive paper hearing before deprivation).[3]

Except in truly unusual circumstances, not present here, surrounded by safeguards to minimize the risk of wrongful attachment, not present here, this Court has never sanctioned a judicial ex parte deprivation. The seminal ex parte attachment cases are, of course, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); and *North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601 (1975).

Sniadach involved a personal debt on a promissory note and the ex parte deprivation, by garnishment, of the use of $31.59 in wages deposited in a bank account. In

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[3] The "temporary" deprivation in most PJR cases continues for several years while the case wends its way to the top of the trial list on Connecticut's crowded dockets.

Sniadach, as here, the plaintiff had no preexisting interest in the property attached. In *Sniadach*, unlike this case, the creditor had to post a bond before garnishment. Nonetheless, this Court declared the Wisconsin statute unconstitutional because, as here, there was "no situation requiring special protection to a state or creditor interest," and the statute was not "narrowly drawn to meet any such unusual condition." *Sniadach*, 395 U.S. at 339. Prior notice and an opportunity to be heard on the validity of the underlying claim was held essential to due process in the absence of a vital government interest.

Fuentes involved a private debt secured by household goods bought under a conditional sales contract, which the creditor sought to replevy ex parte. Unlike this case, the creditor had a preexisting interest in the property and the creditor had to post a bond for "the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ" if the debtor prevailed. *Fuentes*, 407 U.S. at 567 n.7.

But, once again, the statute was found unconstitutional for failure to provide advance notice and an opportunity to be heard. "The minimal deterrent effect of a bond requirement . . . is no substitute for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property." *Fuentes*, 407 U.S. at 83. "While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind." *Fuentes*, 407 U.S. at 86. The *Fuentes* court emphasized that the danger of a substantively unfair or mistaken deprivation of property "is especially great when the State seizes

goods simply upon the application of and for the benefit of a private party." *Fuentes*, 407 U.S. at 81, 92-93.

Mitchell likewise involved a private debt secured by household goods bought under a conditional sales contract, which the creditor sought to replevy ex parte. Unlike this case, however, the creditor had a preexisting interest in the property, and it had to post a bond to compensate for deprivation of use of the property, injury to social standing or reputation, humiliation and mortification, and attorneys fees. *Mitchell*, 416 U.S. at 606 & n.6. In upholding the replevin, the Court repeatedly stressed the importance of the bond in the statutory scheme. *Id.* at 608, 610, 617, 618, 619. Moreover, unlike this case, the creditor filed a detailed affidavit as to the amount claimed, and as to its preexisting interest in the property. The statute allowed replevin only when the plaintiff claimed an interest in the property, and when it was within the power of the defendant to conceal or dispose of the property, and thereby deprive the plaintiff of his preexisting interest in the property.

Mitchell pointedly distinguished *Sniadach* as a case where the suing creditor "had no prior interest in the property attached." *Mitchell*, 416 U.S. at 614. Again, "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditor, pendente lite, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property. . . . Resolution of the due process question must take account

not only of the interests of the buyer of the property but those of the seller as well." *Mitchell*, 416 U.S. at 604.

The Court summarized its reasons for taking the unusual step of dispensing with the ordinary strictures of due process: "Here, the initial hardship to the debtor is limited, the seller has a strong interest, the process proceeds under judicial supervision and management, and the prevailing party is protected against all loss." *Mitchell*, 416 U.S. at 619. At least two of those factors are not present here: the prospective plaintiff had no interest in Doehr's property, and if the attachment is wrongful, the statute does not require a bond to protect Doehr against loss.

Calero-Toledo involved the nonjudicial ex parte seizure of a yacht by the government to prevent its use for unlawful purposes (transportation of drugs). The Court reaffirmed *Fuentes'* view that only in limited circumstances is seizure without an opportunity for prior hearing permissible. 416 U.S. at 678. Such circumstances were met there because the seizure was directly necessary to secure an important governmental interest; there was a special need for very prompt action; and the person initiating the seizure was a government official responsible for determining, under a narrowly drawn statute, that the seizure was necessary and justified. *Calero-Toledo*, 416 U.S. at 679. *See also, e.g., North American Cold Storage v. Chicago*, 211 U.S. 306 (1908); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950).

Plainly, real estate and yachts present very different circumstances; both do not require prompt action. Real property cannot be moved, concealed or destroyed. While

real property can be transferred, such transfers usually involve releases of existing mortgages and creation of new ones, a process which does not take place overnight. Moreover, a real property transfer can readily be traced on the public records. To deter such a transfer, a creditor can assert fraudulent transfer as a count in his tort or contract action. *Murphy v. Dantowitz*, 142 Conn. 320, 114 A.2d 194 (1955). In addition, a defendant would be well-advised not to transfer the real property, since the transfer is admissible against him to show his consciousness of liability. *Batick v. Seymour*, 186 Conn. 632, 433 A.2d 471, 473 (1982).

Most fundamentally, if Connecticut simply provides a prompt *pre*deprivation hearing before attachment of realty, as it does for all other nonexigent attachments, Conn. Gen. Stat. § 52-278d, the risk of interim transfer would be negligible.

Di-Chem involved a commercial debt for goods sold and delivered. The creditor garnished a bank account ex parte, based on an affidavit that it needed the garnishment to protect against loss. Even though the creditor posted a bond in double the amount of the debt, that did not save the statute. The Court noted that where the creditor did not have a preexisting interest in the bank account, the probability of irreparable injury to the debtor "is sufficiently great so that some procedures are necessary to guard against the risk of initial error." *Di-Chem*, 419 U.S. at 608.

In summary, this Court has viewed postdeprivation process as adequate only in limited circumstances not present in this case: an important governmental interest

such as a danger to health and safety, or a strong preexisting interest of the plaintiff in the attached property itself; danger of destruction or concealment of the plaintiff's property interest; a narrowly drawn statute; *and* a bond (or government liability) to protect against an erroneous deprivation.

As respondent now demonstrates, in the context of a purely private dispute, where there is no exigency and the plaintiff has no preexisting interest in the property, the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), mandates advance notice and opportunity to be heard, before real property can be liened to secure a potential judgment.

B. Under the Balancing Test, Respondent was Denied Due Process.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court set forth the factors to be considered when deciding what due process requires:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews held that a predeprivation judicial-type adversarial hearing was not mandated by due process before adverse administrative action, because elaborate predeprivation procedures "provide[d] the claimant with an effective process for asserting his claim prior to any administrative action. . . . " *Id.* at 349. *Cf. King v. Mullins*, 171 U.S. 404, 429-30 (1898) (summary remedies which can be used in the collection of taxes "could not be applied in cases of a judicial nature").

The *Mathews* factors as applied to judicial deprivation overwhelmingly favor predeprivation notice and opportunity to be heard, rather than the ex parte real property attachment in Connecticut's PJR statute.

Private interests of the plaintiff and the defendant. The property owner's interest in his home is "overriding." *United States v. Parcel I. Beginning At a Stake*, 731 F. Supp. 1348, 1354 (S.D. Ill. 1990). Prejudgment attachment of real property can significantly impair the owner's ability to transfer the property or to borrow against it to pay for legal representation. In addition, it may trigger a default clause in the first or second mortgage on the property, precipitating other legal actions and financial difficulty. It may also impair the owner's credit or ability to refinance the property (for necessary repairs, improvements, or even to pay off debts), thereby relegating the homeowner in need of funds to dealing with high interest lenders eager to take advantage of his difficult position.

The Connecticut statute also imposes additional financial burdens on the property owner. It requires the owner either to take affirmative action to eliminate or reduce the attachment, or otherwise challenge its validity,

through a lawyer, or to suffer an invalid or excessive attachment if he can't afford to fight it. Even if the plaintiff readily obtains an undisputed judgment, the inevitable result of a PJR is to increase the size of the judgment by the amount of the sheriff's attachment fees. *Cf. In re Smith*, 866 F.2d 576, 585 (3d Cir. 1990) (advance notice enables a debtor to avoid costs involved in a lawsuit).

Unlike *Mitchell*, where the plaintiff had a prior interest in the property, the private interest of the property owner far outweighs the private interest of a plaintiff who has no consensual security interest in the property. *Garrison Memorial Hospital v. Rayer*, 453 N.W.2d 787 (N.D. 1990); *Olson v. Ische*, 330 N.W.2d 710, 712 (Minn. 1983). A potential plaintiff has no legitimate interest in an ex parte attachment of property just because it is real property. Real estate does not generally diminish in value over time and is not readily concealed. If the plaintiff is concerned about a threatened fraudulent transfer of the property, the procedures of Conn. Gen. Stat. § 52-278e(a)(2), allowing attachment in various exigent circumstances, are available.

But in the ordinary case, a plaintiff has no legitimate interest in a defendant's real estate before getting a judgment. What is really at issue here, as amici's brief makes clear, is the desire to use the PJR to pressure the debtor to pay a disputed claim. Comment, *Attachment*, 22 Stan. L. Rev. 1254, 1260-61 (1970) (even attachments with no economic value, because prior liens exceed the equity, may cause defendants to sacrifice valid defenses and counterclaims under great pressure to get the lien released, and to settle for more than the plaintiff could get at trial). While that surely is a plaintiff's interest, it is just as

surely not a legitimate one. Indeed, public policy strongly favors the right of a consumer to freely dispute an alleged debt. *E.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692g; Billing Error Act, 15 U.S.C. § 1666; Fair Credit Reporting Act, 15 U.S.C. § 1681i; Conn. Gen. Stat. § 42-84a (billing error act); Conn. Reg. State Agencies § 36-243c-5(n), a regulation adopted under the Creditors' Collection Practices Act, Conn. Gen. Stat. § 36-243a.

Accordingly, the first factor, the private interests of the plaintiff and the defendant, weighs heavily against petitioners' position.

The risk of erroneous deprivation under current procedures and the probable value of additional safeguards. The purpose of due process is to reduce the risk of erroneous decisions. *Mathews*, 424 U.S. at 344. "Under the Due Process Clause . . . the Court has recognized that predeprivation process is of 'obvious value in reaching an accurate decision,' that the 'only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the [deprivation] takes effect,' . . . and that predeprivation process may serve the purpose of making an individual feel that the government has dealt with him fairly." *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196 n.14 (1984).

Here, however, the one-sided, self-interested affidavit submitted to obtain an ex parte attachment does not significantly reduce the risk of erroneous deprivation. *Fuentes*, 407 U.S. at 81, 83; *Di-Chem*, 419 U.S. at 608. In *Mathews*, 424 U.S. at 343-44, this factor was crucial: In circumstances where "a wide variety of information may be deemed relevant, and issues of witness credibility and

veracity often are critical to the decisionmaking process. . . . 'written submissions are a wholly unsatisfactory basis for decision' " (quoting *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)). Confrontation is especially important when a dispute rests upon "the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance. . . . " *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

The only arguable predeprivation "safeguards" in the Connecticut statute are the ex parte affidavit and the pro forma judicial participation in authorizing the attachment. In these circumstances, the balancing test favors a predeprivation hearing overwhelmingly. The test favors additional safeguards, as well, because a closer look shows that Connecticut's PJR statute is so inadequate as to encourage, rather than deter, abuse.

First, when it acts on a self-serving ex parte affidavit, "The State acts largely in the dark." *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972). What is more, under the Connecticut statute, the only affidavit required for an ex parte attachment is the general statement "that there is probable cause to sustain the validity of plaintiff's claim." Conn. Gen. Stat. § 52-278e(a). This is unlike Conn. Gen. Stat. § 52-278c(2), for noticed attachments, which requires an affidavit "setting forth a statement of facts sufficient to show that there is probable cause." As a result, the ex parte affidavit tests only the plaintiff's belief as to the strength of his case, *Fuentes*, 407 U.S. at 83, which does nothing to minimize the risk of erroneous deprivation.

Second, the statute contains many built-in delays which preclude the early hearing which petitioners admit is essential to its constitutional validity. Petitioners' Brief at 19, 20. There are no time constraints requiring a prompt post-attachment hearing. An attaching plaintiff need not serve the defendant promptly after attachment, or even file the case in court for at least ninety days. Conn. Gen. Stat. § 52-278j. To dissolve an attachment when the case has not been filed in court, the attached party must file a separate action and seek an order to show cause, incurring filing fees, sheriff fees, and attorney's fees.

Moreover, by law, *at least twelve days* must elapse between service on the defendant and the "return date" when pleadings may commence. Conn. Gen. Stat. § 52-46. Assuming that the case is promptly filed in court, the statute states only that the post-attachment hearing shall be held "expeditiously." The standard is imprecise. Generally the court takes at least two weeks to schedule a hearing; in districts with crowded dockets it can take much longer, as amici recognize. Amicus Brief at 15. One defendant finally resorted to filing a federal action after twenty-two months of not being able to get a hearing. *Gerardi v. Statewide Ins. Co.*, Civil No. N-86-266 (EBB) (D. Conn.) (lodged with the Clerk herein).

A decision on appeal is not as "immediate" as petitioners contend. An appeal could take months, at additional cost to the defendant. The issue on appeal is whether the trial court's decision is clearly erroneous, a substantial barrier to success. *Banks v. Vito*, 19 Conn. App. 256, 562 A.2d 71 (1989).

Third, the post-attachment hearing is strictly limited to "probable cause to sustain the validity of plaintiff's claim." Conn. Gen. Stat. § 52-278e(b), (c). Defendant cannot, for instance, dispute the existence of the exigent circumstances listed in subsection (a)(2) of the statute; or contend that he is insured or otherwise ready, willing, and able to pay any judgment without coercion; that the attachment is excessive; or that it is otherwise unconstitutional. Conn. Gen. Stat. §§ 52-278d, 52-278e(c).[4]

Postdeprivation hearings are rarely requested because they generally only add a layer of costs (attorneys fees) and, when sought, are rarely successful. Shuchman, *Prejudgment Attachments in Three Courts of Two States*, 27 Buffalo L. Rev. 459, 460, 482, 484 (1978). As this Court has observed, "The 'only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the [deprivation] takes effect.'" *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196 n.14 (1984) (quoting *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985)).

Fourth, the PJR statute does not require judicial determination of probable cause unless the defendant asks for a hearing after the attachment is imposed. Conn. Gen. Stat. § 52-278e(c); *Self-Service Sales Corp. v. Heinz*, 1 Conn.

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[4] DiGiovanni sought a $75,000 attachment, three days after he was injured, although he was well enough to retain a lawyer and sign an affidavit. For cases tried to a jury, "When only trials in which the plaintiff won are studied, 50% of the awards are under $17,500 and 75% are under $50,000." Jackson, Superior Court Tort Jury Trial Study 15 (1987). The attachment against Doehr in this case, on average, appears to be well in excess of plaintiff's potential recovery.

App. 188, 192, 470 A.2d 701 (1984). As one court said, in invalidating a statute like Connecticut's, "The judge's only duty with respect to the issuance of the writ is to sign it. Only after a writ has been issued is a judge afforded any opportunity for the exercise of judicial discretion." *Garrison Memorial Hospital v. Rayer*, 453 N.W.2d 787, 792 (N.D. 1990). Rarely will a judge, before signing the order, modify the amount of the attachment requested. Conn. Gen. Stat. § 52-278k.

Fifth, an attaching plaintiff's burden of proof is so minimal as to provide no protection against erroneous deprivation. The plaintiff does not have to establish that he will prevail. *Dow & Condon, Inc. v. Anderson*, 203 Conn. 475, 479, 525 A.2d 935 (1987). *Compare Diane Holly Corp. v. Bruno & Stillman Yacht Co.*, 559 F. Supp. 559, 561 (D.N.H. 1983) (burden to prove that plaintiff will ultimately prevail by more than a mere preponderance of the evidence) *with Ledgebrook Condominium Ass'n v. Lusk Corp.*, 172 Conn. 577, 584, 376 A.2d 60 (1977) (burden of proof not as demanding as proof by fair preponderance).

The plaintiff must merely establish that he has a good faith belief that he has a viable claim. Probable cause "does not demand that a [plaintiff's] belief be correct or more likely true than false." *Anderson v. Nedovich*, 19 Conn. App. 85, 88, 561 A.2d 948 (1989). DiGiovanni met that minimal standard by asserting, "*In my opinion*, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff." J.A. 24A (emphasis added). The standard virtually eliminates proof of liability as a factor to consider, contrary to due process principles. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

Sixth, the statute provides for modification of the attachment only upon the same grounds as could have been asserted in the postdeprivation hearing, that is, absence of the minimal standard of probable cause. Conn. Gen. Stat. § 52-278k. A court may not release the attachment, except on statutory grounds: want of probable cause, failure to return the complaint to court, or substitution of a defendant's bond. *Morris v. Timenterial, Inc.*, 168 Conn. 41, 357 A.2d 507 (1975).

Seventh, the defendant's bond is, itself, a deprivation of property. *Fuentes v. Shevin*, 407 U.S. 67, 85 (1972); *Anderson v. Barnett First Nat. Bank*, 60 F.R.D. 104, 105 (M.D. Ala. 1973). A defendant's bond, to substitute for the attachment, *see* Conn. Gen. Stat. § 52-304, provides little realistic relief for a homeowner who is unable to post it without giving the bonding company a lien on the property, in addition to paying the ten per cent premium. *See De Beers Mines v. United States*, 325 U.S. 212, 222 (1944). "[U]nless the defendant has substantial assets, the bonding company will probably insist that he post security equal to the amount of the bond. Thus, filing an undertaking may serve merely to change the holder of the frozen assets, not free them up." Kheel, *New York's Amended Attachment Statute: A Prejudgment Remedy in Need of Further Revision*, 44 Brooklyn L. Rev. 199, 235 (1978). *See also Lucas v. Stapp*, 6 Wash. App. 971, 497 P.2d 250, 252 (1972) (seizure of property before judgment in a contract action violates due process; "The fact that he could regain possession by acceding to the monetary demands of Lucas or by posting a redelivery bond does not alter the character of that deprivation").

Eighth, Connecticut's real property PJR statute is not limited to narrowly drawn exigent circumstances essential to protect a state or creditor interest. In 1972, this Court held that, absent "truly unusual" circumstances, a hearing is required before a person can be deprived of property. *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972). Accordingly, ex parte prejudgment attachments are almost universally limited to extraordinary circumstances, recognized in *Mitchell*, 416 U.S. at 608, as providing a safeguard which minimizes the risk of wrongful attachment. *See, e.g. Guzman v. Western State Bank*, 516 F.2d 125 (8th Cir. 1975); *Briere v. Agway, Inc.*, 425 F. Supp. 654, 659 (D. Vt. 1977); *Hutchinson v. Bank of North Carolina*, 392 F. Supp. 888, 895 (M.D.N.C. 1975) ; *Stuckers v. Thomas*, 374 F. Supp. 178, 182 (N.D. Ill. 1974); *International State Bank v. Gamer*, 281 N.W.2d 855, 858 (Minn. 1979); *First Bank Western Montana v. Gregoroff*, 770 P.2d 512 (Mont. 1989); *Thompson v. De Hart*, 530 P.2d 272 (Wash. 1975).

Ownership of real estate in which the attaching plaintiff has no prior interest does not present such exigent circumstances. *Garrison Memorial Hospital v. Rayer*, 453 N.W.2d 787 (N.D. 1990); *Olson v. Ische*, 330 N.W.2d 710, 712 (Minn. 1983).

Unless the exigent circumstances of Conn. Gen. Stat. § 52-278e(a)(2) are present, the property owner should have prior notice and opportunity to be heard before being deprived of the fundamental right to own, use and dispose of his real property. In the absence of exigent circumstances, Connecticut's PJR statute does not adequately minimize the risk of abuse or of the wrongful deprivation of property. *Mitchell*, 416 U.S. at 609-10.

Additional safeguards to deter wrongful attachment are essential, and readily available. The most important are advance notice and opportunity to be heard and a bond to deter an overzealous plaintiff from attaching in a doubtful case and to make the defendant whole promptly in the event of wrongful attachment. Because these are missing, the statute cannot stand.

The governmental interest at stake. The state has no legitimate interest in seeing that one of the parties to a private lawsuit is burdened with an impaired adversary position. *Fuentes*, 407 U.S. at 79, 81; *First Alabama Bank v. Parsons Steel*, 825 F.2d 1475, 1483 (11th Cir. 1987); *Traughber v. Beauchane*, 760 F.2d 673, 680 (6th Cir. 1985); *Miofsky v. Superior Court*, 703 F.2d 332, 338 (9th Cir. 1983). Indeed, quite the reverse is true: The state's overwhelming interest would seem to favor maintaining public faith in the impartiality of the court system, by not taking sides:

> Finally, society may suffer what might be termed a "justice cost." Because attachment can work an extreme hardship on debtors, the availability of the attachment remedy gives enormous leverage to creditors. The threat of attachment may induce a debtor to settle at a higher figure than he otherwise would. Although overcrowded court dockets may make out-of-court settlements seem more beneficial, debtors should not be coerced into these settlements. The sense of fair play that must be inherent in our judicial system is diminished when creditors are given such an overwhelmingly strong weapon, particularly when that weapon is available prior to any judgment on the merits. *Thus, in addition to the economic costs, the traditional attachment procedure represents a substantial*

> *cost by making the judicial system party to a procedure that may operate unjustly.*

Zaretsky, *Attachment Without Seizure: A Proposal for a New Creditors' Remedy*, 1978 U. Ill. L.F. 819, at 837 (emphasis added).

Moreover, the attaching plaintiff has no existing property right in the premises which the state might have an interest in protecting, such as a mechanic's lien, mortgage, or a dispute over title. *See* Justice Powell's concurring opinions in *Mitchell*, 416 U.S. 628 n.3, and *Di-Chem*, 410 U.S. at 609; *see also Douglas Research and Chemical, Inc. v. Solomon*, 388 F. Supp. 433 (E.D. Mich. 1975).

The state also has no interest in interfering with the obligations of contract, by converting an unsecured debt to a secured debt when the creditor has not contracted for security in the event of default. *Seattle Credit Bureau v. Hibbitt*, 7 Wash. App. 219, 499 P.2d 92 (Wash. 1972) (action on contract not so truly unusual as to dispense with prior notice and opportunity to be heard). In a contract action, as in a tort action, the defendant may have defenses and counterclaims: payment (computers aren't always right, as this Court recognized in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978)); defective merchandise or workmanship; nondelivery; fraud (*e.g.* Ponzi schemes, time shares); violation of statute which renders the obligation void (Connecticut has such statutes regarding real estate commissions, home solicitation sales, home improvement contracts, and pyramid sale schemes); failure to resell repossessed goods in a commercially reasonable manner; usury; and others. *See generally* National Consumer Law Center, *Sales of Goods and Services* (2d ed. 1989).

Furthermore, contrary to amici's speculation, there is no difference in interest rates or the availability of credit between states which have, and have not, restricted creditor remedies. FTC Credit Practices Rule: Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 7740, 7779-81 (1984). *See also*, Shuchman, *Data on the Durrett Controversy*, 9 Cardozo L. Rev. 605, 606-07 (1987). As Shuchman asserts, "[L]awyers acting as advocates . . . should provide the available empirical evidence as part of a full presentation of their case, whether in a courtroom or before a legislative body." *Id.* at 640. Amici have provided no data to show that credit is more available, or available at a lower cost, in Connecticut than in other states because of its peculiar PJR statute. Nor have they even suggested that Connecticut homeowners get a better rate on unsecured credit cards than do apartment dwellers because of the PJR. Numerous factors other than the availability of a PJR remedy (such as the rate of funds) predominate in credit decisions. *See* 49 Fed. Reg. at 7781.

The state has no justifiable interest in pursuing real property owners as a class. *Bay State Harness Horse Ass'n v. P.P.G. Ind.*, 365 F. Supp. 1299, 1306 (D. Mass. 1973); *Gazzola v. Clements*, 120 N.H. 25, 411 A.2d 147, 151-52 (N. H. 1980). Property owners, the tax-paying backbone of municipal government, are more likely than non-property owners to be solvent and able to pay their debts.

The state's purported interest in assuring that property owners will be able to pay future judgments is especially weak in this case, which involves an alleged assault and battery. A study of tort cases by the Connecticut Judicial Department concluded, "The vast majority of

[tort] cases are disposed by settlement or other method." In other words, no PJR was needed in the vast majority of tort cases, because either the plaintiff withdrew or the defendant paid. Jackson, Superior Court of Connecticut Tort Jury Trial Study 8 (1987) (available at Library, National Center for State Courts).

The study discloses that of over 11,000 tort cases concluded in a two year period, only 2.9% went to jury trial, and the defendant won in about half those cases. "Defendants won non-vehicular tort trials 59% of the time. . . . " *Id. at iv.* At best, then, the state's PJR procedure protects a potential tort judgment in only 1½% of all tort cases, even assuming that all those defendants had real property to attach.

A much earlier study reached similar results. Clark, *Research in Law Administration*, 2 Conn. B.J. 211 (1928). Non-vehicular tort judgments entered for the plaintiff in 35 cases, and for the defendant in 48 cases. For assault and battery, there were 18 judgments for plaintiff, 11 for defendant, 21 cases withdrawn, and 40 discontinued. *Id.* at 219.

The author's comments on prejudgment attachments confirm a longstanding pattern of abuse: "The effect of the harsh remedy of attachment, whereby the defendant's property may be taken at the beginning of the suit to be held to answer to an ultimate judgment, if granted, is brought out, apparently justifying the inference that excessive attachments are not unusual. . . . Almost 85 per cent of these cases [those withdrawn or settled] would, therefore, seem to be cases where the parties use the

court machinery to spar for position in order to effect a compromise." *Id.* at 212-13.

The lack of a government interest is one reason why *Sniadach* invalidated an ex parte seizure in a private dispute: "[I]n the present case, no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual conditions." 395 U.S. at 338. The absence of any government interest is underscored by the fact that restricting ex parte prejudgment attachments, where they are allowed at all, to emergency situations is the norm in this country; Connecticut is the only state which has the type of ex parte attachment statute challenged herein.

Finally, under *Mathews*, the Court must assess the potential administrative burdens imposed by the additional protections. Although petitioners and amici claim that this is a real concern, the scheme they propose is actually *more* cumbersome than the one the Constitution requires. At present the statute, according to petitioners, requires an ex parte attachment proceeding carefully supervised by a judge, *and* then a full postdeprivation adversary hearing at the request of the party subjected to the attachment. On the other hand, what respondent contends the Constitution requires is *one* adversary hearing, held before the attachment issues rather than the two-step process urged by petitioners.

To the extent that a predeprivation hearing imposes more burden on the State than the one petitioners embrace, it can only be because the present system discourages legitimate challenges to wrongful ex parte

attachments. Although that result may serve amici's purposes, it is obviously not legitimate for a State to use its sovereign power to help a prejudgment plaintiff pressure a property owner to pay a debt which may be disputed.

While the State does have an interest in seeing that valid claims are made and pursued, that interest is not advanced by the present statutory scheme which encourages abusive use of ex parte attachments. This legitimate interest would be advanced by pre-attachment notice and hearing, which also reduce the risk of erroneous deprivation in accordance with due process.

III. ESSENTIAL DUE PROCESS SAFEGUARDS INCLUDE A PLAINTIFF'S BOND

Due process requires that any deprivation of property be accompanied by procedures designed to minimize the risk of wrongful deprivation. *Mitchell*, 416 U.S. at 609, 618. "[A] party invoking the powers of a court of justice is [properly] required to give that security which is necessary to prevent its process from being used to work gross injustice to another." *McMillen v. Anderson*, 95 U.S. 37, 42 (1877). "[O]ne purpose in requiring a security as a condition to provisional relief is the fear that provisional relief, necessarily given after an attenuated hearing or none at all, is especially prone to error. . . . " Dobbs, *Should Security be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C.L. Rev. 1091, 1093 (1974). *Cf.* Fed. R. Civ. P. 65(c).

"Before the system subjects itself and the defendant to risks of unfair adjudication, it is appropriate to ask the plaintiff to accept some risks himself. . . . [T]he inhibition

resulting from fear of ultimate liability is desirable rather than undesirable for the party who asks the court to subject a defendant to its orders without hearing the defendant's side of the case." *Id.* at 1114.

Thus, in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), the Court repeatedly emphasized that the statute required the creditor to file a sufficient bond with the court to compensate for wrongful attachment, 416 U.S. at 608, 610, 617, 618, 619, so that "the prevailing party is protected against all loss." *Id.* at 619.

Because a plaintiff's bond minimizes the risk of a wrongful attachment, *Mitchell*, 416 U.S. at 610; *Fuentes* v. *Shevin*, 407 U.S. 67, 83 (1972), both the dissenting and concurring opinions in *Di-Chem*, 419 U.S. at 611, 619 (and presumably therefore the entire Court), were of the view that adequate security is an essential element of due process.

Since *Mitchell* and *Di-Chem*, courts and commentators have consistently viewed the plaintiff's bond as an essential element of prejudgment attachment of property. *Watertown Equipment Co. v. Norwest Bank Watertown*, 830 F.2d 1487, 1493 (8th Cir. 1987) ("Clearly, the centrality of an adequate bond for the protection of the debtor was well established by 1975."); *Jones v. Preuit & Mauldin*, 822 F.2d 998, 1002 (11th Cir. 1987) ("A reasonable person would have known that an attachment accomplished without [a bond] was clearly unconstitutional."), *modified on other grounds en banc*, 851 F.2d 1321 (11th Cir. 1988); *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123, 1130 (3d Cir. 1976); *United States v. Vertol H21C Reg. No. N8540*, 545 F.2d 648, 652 (9th Cir. 1976); *Mississippi Chemical Corp. v.*

Chemical Const. Corp., 444 F. Supp. 925, 941 (S.D. Miss. 1977) (bond is, however, no substitute for a hearing); *Aaron Ferer & Sons Co. v. Berman*, 431 F. Supp. 847, 852 (D. Neb. 1977); *United States General, Inc. v. Arndt*, 417 F. Supp. 1300, 1312 (E.D. Wis. 1976); *Terranova v. Avco Financial Services*, 396 F. Supp. 1402 (D. Vt. 1976) (real property attachment); *Douglas Research and Chemical, Inc. v. Solomon*, 388 F. Supp. 433, 437 (E.D. Mich. 1975); *Searles v. First Nat. Bank*, 127 Ariz. 240, 619 P.2d 749, 754 (1980); *McCrory v. Johnson*, 296 Ark. 231, 755 S.W.2d 566, 569 (1988); *Bernhardt v. Commodity Option Co.*, 187 Colo. 107, 528 P.2d 919 (1974); *Roundhouse Constr. Corp. v. Telesco Masons Supplies Co.*, 168 Conn. 371, 382, 362 A.2d 778 (1975); *Unique Caterers, Inc. v. Rudy's Farm Co.*, 338 So. 2d 1067 (Fla. 1976); *Stoller Fisheries, Inc. v. American Title Ins.*, 258 N.W.2d 336, 345 (Iowa 1977); *Hillhouse v. Kansas City*, 221 Kan. 369, 559 P.2d 1148, 1153 (1977); *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222, 231 (1976); *M.W. Ettinger, Inc. v. Anderson*, 360 N.W.2d 394 (Minn. 1985); *International State Bank v. Gamer*, 281 N.W.2d 855, 858 (Minn. 1979); *Peebles v. Clement*, 63 Ohio St. 2d 314, 408 N.E.2d 689 (Ohio 1980); *Callen v. Sherman's, Inc.*, 92 N.J. 114, 455 A.2d 1102 (1983); *Sharrock v. Dell Buick*, 45 N.Y.2d 152, 164 (1978); *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, 504 S.W.2d 592 (Tex. Civ. App. 1974) (bond doesn't substitute for prior notice and hearing); *E.g.*, 1A P. Coogan, W. Hogan & D. Vagts, *Secured Transactions* § 8.03[1.1] at 885 (1980); Keenan, *Due Process, Garnishment and Attachment*, 1987 S. Dak. L. Rev. 264, 276; Clarkson, *Creditors' Prejudgment Remedies and Due Process of Law*, 12 Conn. L. Rev. 174, 203 (1979); 2 R. Rotunda, J. Nowak & J. Young, *Constitutional Law* § 17.9 at 287 (1986).

Therefore, most attachment statutes require a plaintiff's bond to pay damages in the event judgment is for the defendant, or if the attachment is vacated for any other reason. Comment, *Attachment Statutes*, 38 Yale L.J. 376, 379 (1928); Annotation, *Wrongful Attachment – Damages*, 45 A.L.R. 2d 1221 (1956). Connecticut's current statute doesn't require a bond, although historically there was such a requirement. 1796 Statutes of Connecticut 24; 1838 Statutes of Connecticut 42.[5]

"[T]he need for a bond seems most urgent in the ex parte situation since it is just such a situation that the defendant is least able to present his case and the opportunity for abuse and need for protection are most critical." Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv. L. Rev. 333, 338 (1959). Without a plaintiff's bond, Connecticut's statute "affords ample opportunity for abuse." *Attachment Statutes, supra*, 38 Yale L. J. at 378. *See also* Clark, *Research in Law Administration*, 2 Conn. B.J. 211, 212-23, 230 (1928).

In Connecticut, a plaintiff can attach with impunity, and thus place all the burden of affirmative action and expense on the defendant. Without a bond, there is no risk to a plaintiff which causes him to think twice before attaching a defendant's property. Indeed, before the decision of the Second Circuit below, plaintiffs routinely sought attachment, without allegation of need or exigent

[5] Even a bond would not protect the defendant if the attachment is excessive, as it is in this case; "thus a creditor with a valid debt of disputed size can gain significant leverage in dealing with a debtor with little fear of reprisal." Comment, *Attachment*, 22 Stan. L. Rev. 1254, 1261 (1970).

circumstances, in every case where the defendant owned real property. In her Petition for Rehearing below, the Attorney General estimated that 300-400 new ex parte real estate attachments were granted every week in Connecticut. Brief on Petition at 14.

While respondent believes that a counterclaim for wrongful attachment is inadequate as a substitute for the security of a bond, there is no such remedy for wrongful attachment in Connecticut. An attachment is wrongful simply when it is dissolved. *Newby v. United States Fidelity and Guaranty Co.*, 49 Wash. 2d 843, 307 P.2d 275 (1957); *Braun v. Pepper*, 224 Kan. 56, 578 P.2d 695, 699 (1970). In most states, to recover for simple wrongful attachment, the defendant need not show malice or want of probable cause. *Newby*, 307 P.2d at 277; *Braun*, 578 P.2d at 699; Cobbey, *Replevin* § 1278 (2d ed. 1900).

But in Connecticut, the only possible remedy entails both bringing a separate action, and proving that the attachment was without probable cause. A postdeprivation remedy for wrongful attachment is constitutionally inadequate where the only remedy is an independent tort action – a lengthy and speculative process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436-37 (1982).

Until 1986, Connecticut's only remedy for wrongful attachment was an action for vexatious litigation. Petitioners argue that, since 1986, another remedy has been available: a statutory claim under Conn. Gen. Stat. § 52-568(a)(1), providing for double damages if a person commences and prosecutes an action, without probable cause. That remedy is unrealistic, for several reasons.

First, because Connecticut rules of practice do not permit a counterclaim unless it arises out of the transaction alleged in the complaint, *Guild Equities, Inc. v. Harris*, 3 Conn. Cir. 218, 210 A.2d 459 (App. Div. 1965); *Springfield-Dewitt Garden, Inc. v. Wood*, 143 Conn. 708, 713, 125 A.2d 488 (1956) (cannot assert tort counterclaim in contract action), such a statutory claim must, as a general rule, be brought as a separate action, causing the attached party to incur additional expenses (filing fee, sheriff's fee, attorney's fee).

More specifically, Connecticut law is clear that the attached defendant simply cannot raise the § 52-568 claim in the underlying lawsuit. *Blake v. Levy*, 191 Conn. 257, 263-64, 464 A.2d 52 (1983); *Vandersluis v. Weil*, 176 Conn. 353, 356, 407 A.2d 982 (1978); *Shaefer v. O.K. Tool Co.*, 110 Conn. 528, 530-31, 148 Atl. 330 (1930); *Johndrow v. Architects Bldg. Co.*, 2 CT. L. Rptr. 111 (Conn. Super. Ct. 1990). The underlying lawsuit must have terminated in order to proceed, because to allow a vexatious litigation counterclaim in the underlying action, according to the Connecticut Supreme Court, would chill the presentation of honest but uncertain causes of action.

Second, in many cases, as in this case, an independent judicial official has already made a pro forma finding of probable cause, even though the statute does not literally require such a determination. *Compare* Conn. Gen. Stat. § 52-278d *with* § 52-278e(c). While that independent finding of probable cause is not conclusive, it can be rebutted only by evidence that the judge's decision was procured by fraud, perjury, misrepresentation, or falsification of evidence, not simply by showing that the defendant prevailed in the underlying action. *Solitro v. Moffatt*, 523 A.2d

858, 863 (R.I. 1987). Thus, it is highly unlikely that, after a judicial finding of probable cause, an attached defendant will be able to show absence of probable cause.

Third, another barrier to recovery for wrongful attachment in the subsequent action is the difficulty of proving that the underlying action was brought without probable cause. Probable cause is merely a subjective belief that the attaching plaintiff had a claim. Probable cause "does not demand that a [plaintiff's] belief be correct or more likely true than false." *Anderson v. Nedovich*, 19 Conn. App. 85, 88 (1989).

Fourth, an attorney's advice that there is probable cause to begin an action is a complete defense, even if counsel's advice was unsound or erroneous. *Vandersluis*, 176 Conn. at 361; *H.B. Associates, Inc. v. Joaquim*, 2 CT. L. Rptr. 447 (Conn. Super. 1990); *Stewart v. Sonneborn*, 98 U.S. 187, 196 (1878); *Duncan v. Peck*, 844 F.2d 1261, 1267 (6th Cir. 1988).

Finally, and most fundamentally, whether by counterclaim or otherwise, a wrongful attachment claim cannot make up for a lack of due process: the failure to provide a meaningful hearing at a meaningful time. Nor can this postdeprivation remedy perform the function of a bond, which is to *promptly* make whole the victim of the wrongful attachment.

In contrast, a bond would permit the defendant to recover, usually in the same action, if the attachment is dissolved for any reason. *Russell v. Farley*, 105 U.S. 433, 437-47 (1881); *Blumenthal v. Merrill Lynch*, 910 F.2d 1049, 1054 (2d Cir. 1990); Cobbey, *Replevin* §§ 676, 1269 (2d ed. 1900).

Connecticut doesn't provide for a bond. The defendant's speculative remedy of bringing additional, costly, highly doubtful litigation, provides no deterrence to an attaching plaintiff. Thus, in failing to minimize the risk of erroneous deprivation, the Connecticut statute violates due process.

CONCLUSION

Respondent respectfully requests that this Court affirm the decision below on the opinion of Judge Pratt.

Respectfully submitted,

JOANNE S. FAULKNER
(Counsel of Record)
123 Avon Street
New Haven CT 06511
(203) 772-0395

BRIAN WOLFMAN
ALAN B. MORRISON
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington D.C. 20036
(202) 785-3704

Attorneys for Respondent

Dated: December 17, 1990

No. 90-143

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DiGIOVANNI,
Petitioners,

v.

BRIAN K. DOEHR,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

Petitioners:

State of Connecticut:

CLARINE NARDI RIDDLE
ATTORNEY GENERAL OF THE
STATE OF CONNECTICUT

ARNOLD B. FEIGIN
CAROLYN K. QUERIJERO
HENRY S. COHN*
Assistant Attorneys General
P.O. Box 120
Hartford, Connecticut 06101
Telephone: (203) 566-4990

John F. DiGiovanni:

ANDREW M. CALAMARI
2429 Hering Avenue
Bronx, New York 10469
Telephone: (212) 655-3636

*Counsel of Record

Printed by
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66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

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STATEMENT OF THE CASE

In his brief on the merits, the respondent goes far beyond the scope of the Second Circuit's ruling, making a sweeping attack on attachments in general, often relying on facts which are not in the record and/or blatantly false or misleading. The petitioners respond briefly herein.

The holding of the Second Circuit upon which this Court granted certiorari is that the statute at issue "violates the requirements of due process because (1) it permits the issuance of *ex parte* attachments in the absence of extraordinary

circumstances . . . ."[1] *Pinsky v. Duncan*, 898 F.2d 852, 858 (2d Cir. 1990), Pet. App. 16A.

The issue before this Court is whether Conn. Gen. Stat. § 52-278e(a)(1), as *written* and as interpreted by the Connecticut Supreme Court, satisfies Fourteenth Amendment procedural strictures. Based upon applicable case law, the statute satisfies these due process requirements.

[1] Judge Pratt's second ground, that the statute fails to require a bond or other security before obtaining the attachment, was not accepted by the two other panel members and is not the holding of the court. As discussed below, respondent did not file a cross-petition with this Court on this point.

ARGUMENT

I. THE RESPONDENT'S BRIEF RELIES ON FACTS WHICH ARE NOT IN THE RECORD AND ON FACTS AND LAW WHICH ARE ERRONEOUS.

This case arose in the District Court on summary judgment. The *only* facts submitted under Local Rule 9, which requires a statement of material facts on such a motion, were that a suit for assault and battery had originally commenced in the Superior Court, and that an attachment under Conn. Gen. Stat. § 52-278e(a)(1) had occurred. J.A. 14A.

Now apparently not satisfied with the facial attack being made on the statute, respondent is trying to add to the record at this time by referring in his brief to numerous facts never presented below. Indeed, even respondent acknowledges that, unlike this case, an "as applied" case would be possible, consisting of "available empirical evidence," but that such was never presented. Respondent's brief at 30. Each of these attempts at amplification should be rejected by this Court. These additions will be discussed below.

A. The Expeditious Hearing

The respondent repeatedly makes the claim, unsupported by any evidence of record, that the statute, Conn. Gen. Stat. § 52-278e(c), does not guarantee an "expeditious" hearing. *See* respondent's brief at 4, 7, 13 (note), and 23. In fact, § 52-278e(c) specifically requires an expeditious hearing, and the Connecticut Supreme Court has interpreted this to require an *immediate* hearing. *Fermont Div., Dynamics Corp. of America v. Smith*, 178 Conn. 393, 398, 423 A.2d 80, 83 (1979).

This interpretation of the highest court of the state is binding on the Superior Court. Although respondent has

made reference to delays of months or years in obtaining hearings, he has provided no evidence in the record to support this, although he had ample opportunity in the District Court to do so.[2]

In fact, contrary to respondent's unsupported allegations, in a Connecticut Supreme Court case interpreting the statute at issue, a hearing was provided *one week* after the defendant moved to dissolve the remedy. *Fermont*, 178 Conn. at 395. Thus, respondent's new, unsupported allegations should be disregarded by this Court.

B. Judicial Determination Of Probable Cause

Respondent now claims that the statute does not require a judicial determination of probable cause before attachment, and that the judge acts only as a "rubber stamp" with no discretion to deny or modify the prejudgment remedy. *See* respondent's brief at 22, 25.

The respondent has provided no evidence of record to support this claim, probably because it is false on its face. Conn. Gen. Stat. § 52-278e(a)(1) requires a finding of probable cause by a judge before an attachment may be approved, and the Connecticut Supreme Court has so interpreted the statute. *See Fermont*, 178 Conn. at 397, 423 A.2d at 83; Newman, J. dissenting in *Pinsky* at 862, Pet. App. at 26A. Certainly judges are presumed to carry out their responsibilities in the absence of evidence to the contrary.

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[2] *Gerardi v. Statewide Insurance Co.*, Civ. No. N-86-266(EBB), cited twice by respondent, did not involve prejudgment attachment; it involved a temporary restraining order, specifically exempt from this statutory scheme. Conn. Gen. Stat. § 52-278a(d).

C. Factual Allegations In Affidavit

Respondent falsely contends in his brief that the application for prejudgment remedy may be based upon mere conclusory allegations, without specific underlying facts. Respondent's brief at 22. This is directly contradicted by the language of the statute as interpreted by the Connecticut Supreme Court in *Kukanskis v. Griffith*, 180 Conn. 501, 505, 430 A.2d 21, 23 (1980) ("Because § 52-278e(1) requires a *factual showing* that probable cause exists to sustain the validity of plaintiff's claim, it comports with constitutional requirements.") (emphasis added). *See also* Newman, J. dissenting in *Pinsky* at 862, Pet. App. at 26A.[3]

D. Allegations Of Harm To Respondent Are Not In The Record

Apparently recognizing the dearth of evidence in the record below concerning harm to respondent from the lack of a pre-attachment hearing, the respondent now attempts to create a record for this Court by making sweeping, unsupported allegations of serious economic and psychological harm.[4]

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[3] The respondent claims that the affidavit in this proceeding was insufficient. Respondent's brief at 1. But this affidavit did set forth the facts giving rise to the assault and battery claim as well as describing in detail the nature of the serious injuries suffered. As regards the showing needed under § 52-278e(a)(1), it is clear that this section refers back to § 52-278c and § 52-278d, both of which require detailed factual affidavits.

[4] The following are allegations made in the respondent's brief with no basis in the record; some are "entirely theoretical." Newman, J., *Pinsky* at 863, Pet. App. at 28A.

Page 8: A prejudgment remedy on real estate will defeat the defendant's efforts to "finance one's defense, to pay for home repairs, education, medical expenses, to buy a car, to move up to a more expensive home."

Page 10: The defendant is financially and psychologically affected by the real estate attachment.

(continued)

These allegations should be disregarded out of hand, not only because they find no support in the record, but also because they often relate to harm stemming from the nature of attachments in general, unrelated to the issue of a prior hearing. The Second Circuit's ruling dealt with the *timing* of the hearing and did not address the constitutionality or the speculative harm of attachments themselves.

E. A Defendant May Receive A Prompt Hearing Regardless Of The Return Day

Respondent argues at 3 that the defendant must await the running of the return day before he appears to contest the attachment. This is untrue. Upon service, the defendant may ask for a probable cause hearing. The notice to the attached party required by Conn. Gen. Stat. § 52-278e(b) indicates that a hearing to challenge or seek modification of the attachment is available upon request, and gives no indication that the party must await the return day. Indeed, the defendant in this case appeared one week *before* the return day, even though he chose not to request a hearing. J.A. 33A.

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[4] *(continued)*

Page 19: The attachment may impair transfer of the property, borrowing against the property, cause a default in the defendant's mortgage, and impair his credit rating.

Page 20: An attachment leads to an "increase in the size of the judgment."

Page 20: Attachments are used to "pressure the debtor to pay a disputed claim."

Page 22: Judicial participation is *pro forma* and few attachments are refused or modified.

Page 31: Citations to empirical evidence from two studies not in evidence.

These "facts" are not before this Court and should not enter into the analysis of the issues herein.

F. The Respondent Has Incorrectly Interpreted Precedent

Petitioners disagree with numerous statements of law in respondent's brief. The following highlight the major disagreements:

On page 6, respondent states that "[a]ttachment . . . is tantamount to an involuntary dispossession," citing 45 A.L.R.2d 1221 (1956). This quotation is found in an annotation discussing remedies in general and has no applicability to an attachment on real property. *Id.* at 1234.

The elaborate string of citations on Page 9 of respondent's brief is apparently added to the brief to show that *ex parte* prejudgment attachments on real property have uniformly been held unconstitutional. Yet these cases involve statutes which are entirely distinguishable from Connecticut's provisions and lack the numerous protections of Connecticut's statutory procedure.

The citation to *United States v. The Premises at Livonia*, 889 F.2d 1258 (2d Cir. 1989) is wholly irrelevant. In *Livonia*, the homeowner, without prior hearing, forfeited his property to the federal government on the finding of a narcotics violation. *Livonia* hardly involves the temporary and non-invasive situation found under the Connecticut statute.

Finally, there is no showing in *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601 (1975), as respondent contends at 17, that this Court relied on the lack of the creditor's pre-existing interest in the debtor's bank account in finding the garnishment unconstitutional. It was the failure of the Georgia statutes to have various "saving characteristics" which voided the garnishment there, saving characteristics which are all present in the case at bar.

G. The Governmental Interest

The respondent claims that the goal of a state's prejudgment remedy mechanism must be to remain impartial (page 28 respondent's brief). Here Connecticut's statutory scheme has done just that. The Connecticut statute is even-handed in approach, allowing the creditor or other claimant to obtain or preserve a remedy and at the same time providing protection to the homeowner from arbitrary action or serious harm. This is the essence of procedural due process.

II. THE HOMEOWNER IS PROTECTED FROM WRONGFUL ATTACHMENT UNDER THE CONNECTICUT PROCEDURE.

In Part III of his brief, the respondent attempts to raise the argument, rejected in the Second Circuit, that the failure of Connecticut to require a bond by the plaintiff is unconstitutional. Judge Mahoney in his concurrence and Judge Newman in his dissent held otherwise. As Judge Newman pointed out in *Pinsky:* "[S]ince this . . . point does not command the support of a majority of the panel, it is not a requirement imposed by today's ruling." *Pinsky,* 898 F.2d at 862, Pet. App. 25A.

Respondent did not file a cross-petition for certiorari under Supreme Court Rule 12.3; therefore the issue of the plaintiff's bond is not before the Court. Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986) § 6.35 (where prevailing party seeks modification of judgment imposing additional ground of recovery not accepted by circuit court, a cross-petition should be filed).

In any event, the Second Circuit's concurring and dissenting judges undoubtedly were correct in deciding that protection of the homeowner from wrongful attachment was accomplished by the right to sue for double damages under Conn. Gen. Stat. § 52-568(a). The cases cited by respondent,

see, e.g., Jones v. Preuit & Mauldin, 822 F.2d 998, 1002 (11th Cir. 1987), require protection by bond or *otherwise.*[5] Connecticut law adequately provides the "otherwise" sufficient to satisfy due process.

Certain decisions in Connecticut, such as *Hydro Air of Conn., Inc. v. Versa Technologies, Inc.,* 99 F.R.D. 111 (D. Conn. 1983) (applying Connecticut law) approve a counterclaim for wrongful attachment in the main suit. But even if a separate suit is required by the attached party, this is an adequate remedy to restrain the possible illegal action of the attaching plaintiff. This certainly meets what this Court has required for procedural due process.

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[5] The respondent has not accurately quoted from this case in his brief at 34. The court stated that procedural protections were needed, but did not mandate that these protections include a bond.

CONCLUSION

The opinion and judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted.

Petitioner
STATE OF CONNECTICUT:

CLARINE NARDI RIDDLE
ATTORNEY GENERAL

CAROLYN K. QUERIJERO
Assistant Attorney General

ARNOLD B. FEIGIN
Assistant Attorney General

HENRY S. COHN
Counsel of Record
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, Connecticut 06101
Telephone: (203) 566-4990

Petitioner
JOHN F. DIGIOVANNI:

ANDREW M. CALAMARI, ESQ.
2429 Hering Avenue
Bronx, New York 10469
Telephone: (212) 655-3636

December, 1990

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Allan B. Taylor
Counsel of Record
James J. Tancredi
Kirk D. Tavtigian, Jr.
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

Attorneys for the Connecticut Bankers Association and the Savings Banks' Association Of Connecticut

Printed by
Brenzo's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4264

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Allan B. Taylor
Counsel of Record
James J. Tancredi
Kirk D. Tavtigian, Jr.
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

Attorneys for the Connecticut Bankers Association and the Savings Banks' Association Of Connecticut

On October 1, 1990, this Court granted certiorari in this case and granted the motion of the Connecticut Bankers Association and the Savings Banks' Association of Connecticut for leave to file a brief as amici curiae in support of the State of Connecticut's petition for a writ of certiorari. The amici respectfully move for leave to file the accompanying brief as amici curiae on the merits pursuant to Rule 37.3 of the Rules of this Court. The consent of the Petitioners, the State of Connecticut and John F. DiGiovanni, have been filed with this motion. The Respondent, Brian K. Doehr, has refused to consent to the filing of the brief.

INTEREST OF THE AMICI CURIAE

Almost all Connecticut banks are members of either the Connecticut Bankers Association or the Savings Banks' Association of Connecticut. The Connecticut Bankers Association, formed in 1899, is comprised of 52 commercial banks, trust companies and other banking institutions in Connecticut. The Savings Banks' Association of Connecticut, formed in 1902, is comprised of 64 savings banks. The purpose of both associations is to contribute to a sound banking system in the State of Connecticut and to promote the general welfare and interests of their member banks.[1]

While prejudgment security has always been important to the amici and other creditors in the collection of unsecured loans, it also now is significant in Connecticut in the collection of both commercial and residential real estate loans. The decline in real estate values in Connecticut has caused loans which were fully secured when made to be undersecured now. Due primarily to the economic downturn in Connecticut and the resulting loan defaults, particularly in the real estate market, the member banks of the amici have initiated and will continue to initiate litigation to collect hundreds of millions of dollars

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[1] A list of the member banks of the amici is listed at pp. 1A-4A of the Appendix ("App.") of Amici Curiae attached hereto.

of loans in default. The economic downturn in Connecticut also has caused debtors to go to greater lengths than usual to dispute, attempt to avoid, or delay payment of their debts. Accordingly, obtaining effective prejudgment security is vital to the amici and other creditors in Connecticut.

Banks' and other creditors' most efficient, effective and expeditious form of prejudgment security has been *ex parte* real estate attachments obtained pursuant to Conn. Gen. Stat. § 52-278e(a)(1), the statute invalidated by the Second Circuit in this case. Among the issues the amici will address are the adverse effects of the Second Circuit's decision on the price and availability of credit and on the efficient resolution of creditor-debtor disputes in Connecticut. The amici also will demonstrate that even if § 52-278(a)(1) were unconstitutional as applied in this case, the Second Circuit should not have invalidated the statute on its face. The State of Connecticut and John F. DiGiovanni have emphasized other issues in their brief.

For all the foregoing reasons, the Connecticut Bankers Association and the Savings Banks' Association of Connecticut respectfully move for leave to file the accompanying brief as amici curiae.

Respectfully submitted,

Allan B. Taylor
Counsel of Record
James J. Tancredi
Kirk D. Tavtigian, Jr.
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

Attorneys for the Connecticut
Bankers Association and the
Savings Banks' Association
of Connecticut

November 1990

No. 90-143

In The

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DIGIOVANNI,
Petitioners,

v.

BRIAN K. DOEHR,
Respondent.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE CONNECTICUT BANKERS ASSOCIATION AND THE SAVINGS BANKS' ASSOCIATION OF CONNECTICUT AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Allan B. Taylor
Counsel of Record
James J. Tancredi
Kirk D. Tavtigian, Jr.
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

Attorneys for the Connecticut Bankers Association and the Savings Banks' Association Of Connecticut

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INTEREST OF THE AMICI CURIAE

The interest of the Connecticut Bankers Association and the Savings Banks' Association of Connecticut in this case is set forth in the accompanying Motion For Leave To File Brief as Amici Curiae.

SUMMARY OF ARGUMENT

Connecticut's prejudgment remedy statutes provide significant procedural and substantive protections against wrongful attachment. Connecticut's *ex parte* real estate attachment statute, Conn. Gen. Stat. § 52-278e(a)(1), allows *ex parte* attachments of real estate only if a judge finds probable cause based on a factual affidavit. Connecticut's prejudgment remedy statutes provide for an expeditious post-attachment hearing at the defendant's request, allow the defendant at anytime to substitute a bond or other property for the liened property, require that a defendant be given notice of these rights, and provide for immediate appellate rights. Under Connecticut law, the defendant also has a double damages cause of action for wrongful attachment.

Nevertheless, the Second Circuit, stating that attachment is an "extraordinary . . . remedy," held § 52-278e(a)(1) unconstitutional on its face because it does not provide for prior notice and hearing. The Second Circuit erred by holding that a real estate attachment may issue *ex parte* only if extraordinary circumstances exist. The Second Circuit also erred because the Connecticut prejudgment remedy statutes fairly balance the interests of debtors, creditors and the State. The deprivation, if any, caused by a real estate attachment is de minimis, and is ameliorated by the debtor's right to an immediate hearing to dissolve the attachment, and absolute right to substitute a bond for the attachment. The risk of an erroneous deprivation is minimal because of judicial supervision of the attachment process and because under Connecticut law debtors have a cause of action for wrongful attachment. The decision will adversely affect the important state interests in regulating the price and availability of

credit in Connecticut and the efficient resolution of creditor-debtor disputes. Finally, even assuming that the Second Circuit correctly decided that the risk of an erroneous deprivation without a hearing is substantial in a case such as this, involving an alleged assault and battery, the court should not have invalidated § 52-278e(a)(1) on its face, because the statute typically is utilized in creditor-debtor disputes, in which documentary proof minimizes the risk of an erroneous deprivation.

ARGUMENT

I. SECTION 52-278e(a)(1) COMPORTS WITH DUE PROCESS BECAUSE IT FAIRLY ACCOMMODATES THE INTERESTS OF DEBTORS, CREDITORS AND THE STATE.

A. The Second Circuit Erred In Holding That Attachment Of Real Estate Without Prior Notice And A Hearing Is Permissible Only If Extraordinary Circumstances Exist.

The Second Circuit stated that this Court's decisions require prior notice and a hearing absent "extraordinary circumstances," which "must be truly unusual", such as "to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, [or] to protect the public from misbranded drugs and contaminated food." *Pinsky v. Duncan*, 898 F.2d 852, 854, 855 (2d Cir. 1990) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972)). This standard is contrary to decisions of this Court approving property deprivations without notice and hearing and absent such "extraordinary circumstances". *See, e.g., Zinermon v. Burch*, ___ U.S. ___, 110 S. Ct. 975, 984 (1990); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (prior hearing unnecessary to terminate social security payments); *Barry v. Barchi*, 443 U.S. 55 (1979) (hearing not necessary prior to suspension of horsetrainer's license); *cf. Ingraham v. Wright*, 430 U.S. 651, 682 (1977)

(hearing not required before corporal punishment of junior high school students).

This Court in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), did not require "a national war effort" or similar extraordinary circumstances to hold that a predeprivation hearing was not constitutionally required, and made clear that with respect to prejudgment remedies prior notice and hearing typically were not required:

> The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931) . . .
>
> 'It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.' (quoting *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950)).
>
> More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors, without notice, hearing, or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit.' (quoting *Coffin Brothers v. Bennett*, 277 U.S. 29, 31 (1928)).

Mitchell v. W.T. Grant Co., supra, 416 U.S. at 611-613.

Mitchell was confirmed in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), in which this Court held that a

Georgia garnishment statute violated the Fourteenth Amendment because, *inter alia*, it did not provide for an "early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment." *Id.* at 606, 607; *see Id.* at 611 (Powell, J. concurring) ("Pregarnishment notice and a prior hearing have not been constitutionally mandated in the past . . . Such restrictions, antithetical to the very purpose of the remedy, would leave little efficacy to the garnishment and attachment laws of the 50 States.") (footnote omitted). "By adopting the *Mitchell* analysis . . . the *Di-Chem* Court implicitly rejected the *Fuentes* requirement that preseizure notice and hearing be given in all but extraordinary cases. Instead, the Court seemed to indicate that a prejudgment remedy satisfies due process if the statute provides for either preseizure notice and hearing or adequate safeguards combined with an early postseizure hearing." Hansford, *Procedural Due Process in the Debtor-Creditor Relationship: The Impact of Di-Chem*, 9 Ga. L. Rev. 589, 605-06 (1975) (footnote omitted).[1]

This Court should find that the Second Circuit erred in holding that a real estate attachment without prior hearing and notice is permissible only if extraordinary circumstances exist.

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[1] *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 691 (1974) (White, J., concurring) ("presence of important public interests . . . is only one of the situations in which no prior hearing is required."); Pearson, *Due Process and the Debtor: The Impact of Mitchell v. W.T. Grant*, 29 Okla. L. Rev. 277, 293, 318 (1976) (footnote omitted) ("After *Mitchell* and *Di-Chem*, the [Fuentes] "extraordinary situations" rule might well be considered something of a relic."); *see* Note, *The Constitutionality of Real Estate Attachments*, 37 Wash. & Lee L. Rev. 701, 710 (1980) (*Mitchell* and *North Georgia Finishing, Inc.* "dispens[ed] with the requirement of a prior hearing when the attachment statute provides for a prompt post-seizure hearing."); *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 534 n.16 (5th Cir. 1978).

B. Section 52-278e(a)(1) Satisfies The Fourteenth Amendment Because A Real Estate Attachment Is A De Minimis Deprivation, The Risk Of An Erroneous Deprivation Is Minimal, And The Statute Promotes Significant State Interests.

Three factors are relevant in determining if a statute violates the due process clause:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, supra, 424 U.S. at 335.

In creditor-debtor disputes, the "procedural protection is adequate if it represents a *fair accommodation* of the respective interests of creditor and debtor." *Republic Indus. v. Central Pa. Teamsters Pension Fund*, 534 F. Supp. 1340, 1345 (E.D. Pa.), *rev'd on other grounds*, 693 F.2d 290 (3d Cir. 1982) (quoting in part *Finberg v. Sullivan*, 634 F.2d 50, 58 (3d Cir. 1980) (en banc)).

The Second Circuit failed to consider that the degree and the possible length of wrongful deprivation caused by a real estate attachment pursuant to the Connecticut prejudgment remedy statutes

are de minimis.[2] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982); *Memphis Light, Gas & Water Division v. Craft*, 436

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[2] Based on this Court's precedents the Second Circuit should not have held that a real estate attachment constitutes a Fourteenth Amendment deprivation of property. Lower courts, in decisions approved by this Court, have held that non-possessory real estate liens do not constitute a deprivation of property, because they do not prohibit the possession, use, renting or transfer of real property. *Bustell v. Bustell*, 107 Mont. 457, 555 P.2d 722 (1976), *appeal dismissed*, 430 U.S. 925 (1977); *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd*, 417 U.S. 901 (1974); *see Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976).

The court in *Spielman-Fond, Inc.* held that the recording of a mechanic's lien certificate without prior hearing and notice to the property owner did not violate the Fourteenth Amendment due process clause. The sole basis for the court's decision was that the recording of the lien did not constitute a deprivation of property. *Spielman-Fond, Inc., supra*, 379 F. Supp. at 999. This Court summarily affirmed *Spielman-Fond Inc.*, 417 U.S. 901 (1974).

The court in *Matter of Northwest Homes of Chehalis, Inc.*, stating that the effect of a real property attachment "is exactly the same as the effect of the notice of lien in *Spielman-Fond*," relied on this Court's affirmance of *Spielman-Fond, Inc.* in holding that an *ex parte* real estate attachment did not constitute a deprivation of property for purposes of the Fourteenth Amendment. *Id.* at 506. This Court denied certiorari in *Matter of Northwest Homes*, 425 U.S. 907 (1976).

The issue in *Bustell v. Bustell* was whether a real estate attachment violated the Fourteenth Amendment because it was issued without prior notice or hearing. The *Bustell* Court, relying on both *Matter of Northwest Homes of Chehalis, Inc.* and *Spielman-Fond, Inc.*, held that the attachment did not violate the Fourteenth Amendment because it did not constitute a property deprivation. *Bustell v. Bustell, supra*, 555 P.2d at 724. This Court dismissed an appeal of *Bustell* for want of a substantial federal question. 430 U.S. 925 (1977).

In reliance on this Court's affirmance of *Spielman-Fond, Inc.*, other courts have held that *ex parte* attachments of real estate do not constitute a

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(*. . . Continued*)

Fourteenth Amendment deprivation of property. *Pay 'N Save Corp. v. Eads*, 53 Wash. App. 443, 767 P.2d 592 (1989); *First Recreation Corp. v. Amoroso*, 113 Ariz. 572, 558 P.2d 917 (1976); *see also In re Thomas A. Cary, Inc.*, 412 F. Supp. 667 (E.D. Va. 1976), *aff'd without op.*, 562 F.2d 48 (4th Cir. 1977); *In re The Oronoka*, 393 F. Supp. 1311 (D. Me. 1975); *Morse v. Rentar Ind. Development Corp.*, 85 Misc. 2d 304, 379 N.Y.S.2d 994 (1976), *aff'd*, 56 A.D.2d 303, 391 N.Y.S.2d 425 (1977), *aff'd*, 43 N.Y. 2d 952, 404 N.Y.S.2d 343, 375 N.E.2d 409, *appeal dismissed*, 439 U.S. 804 (1978) (all relying on *Spielman-Fond, Inc.* in holding that recording a mechanic's lien certificate does not constitute a Fourteenth Amendment property deprivation.)

The precise issue decided in *Spielman-Fond, Inc.* and *Bustell* was that a non-possessory real estate lien does not constitute a deprivation of property. This Court's summary dispositions in those cases are binding on the Courts of Appeals as to that issue. *See e.g. Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

In holding that a real estate attachment constituted a Fourteenth Amendment deprivation of property, the court below attempted to distinguish *Spielman-Fond, Inc.* by noting that mechanic's lienors, unlike general creditors, must have a pre-existing right in the property. *Pinsky v. Duncan*, 898 F.2d 852, 854 (2d Cir. 1990). This attempt to distinguish *Spielman-Fond, Inc.* is not persuasive because, regardless of the creditor's pre-existing interest in the property, mechanic's lien certificates and real estate attachments have "exactly the same . . . effect" on the debtor's interest in the property. *Matter of Northwest Homes of Chehalis, Inc., supra*, 526 F.2d at 506.

The court below also decided that a real estate attachment is a deprivation because the attachment could impair the marketability of the property, harm the owner's credit rating and prevent the property from being used as collateral. *Pinsky, supra*, 898 F.2d at 854. The same potential effects were present as a result of the mechanic's lien in *Spielman-Fond, Inc.* and the attachment in *Bustell*, but both courts, in cases approved by this Court, found no deprivation of property. *See also McInnes v. McKay*, 127 Me. 110, 141 A. 669 (1928), *aff'd sub nom McKay v. McInnes*, 279 U.S. 820 (1929) (real estate attachment without

(*Continued . . .*)

U.S. 1,19 (1978); *Mathews v. Eldridge, supra*, 424 U.S. at 341; *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 618. The deprivation caused by a real estate attachment is insignificant compared to the *ex parte* repossession of personal property approved by this Court in *Mitchell*. A real estate attachment in no way interferes with the defendant's use or possession of the property, and a defendant's livelihood is not threatened by a real estate attachment. *Pinsky v. Duncan*, 716 F. Supp. 58, 60 (D. Conn. 1989), *rev'd on other grounds*, 898 F.2d 852 (2d Cir.), *amended*, 907 F.2d 17 (2d Cir.), *cert. granted*, 59 U.S.L.W. 3243 (U.S. Oct. 2, 1990) (No. 90-143). Accordingly, there is no "basis to apply the same due process protections deemed necessary for these total deprivations of property [in *Sniadach, v. Family Finance Corp.*, 395 U.S. 337 (1969), *Fuentes, Mitchell* and *North Georgia Finishing, Inc.*] to the relatively minor impairment of interests covered by an attachment of real estate." *Pinsky v. Duncan, supra*, 898 F.2d at 863 (Newman, J., dissenting); *Williams v. Bartlett*, 189 Conn. 471, 479, 457 A.2d 290, 294, *appeal dismissed*, 464 U.S. 801 (1983) (deprivation caused by lis pendens is de minimis and requires less protections than total deprivations of property in *Sniadach* and *Fuentes*).

The Second Circuit also failed to consider the potential length of the deprivation:

> The final aspect of the severity of impact test is the length of time between the initial deprivation and the full hearing on the merits. The magnitude of harm is found to increase in direct proportion to the time lapse between the deprivation and the opportunity for a full hearing.

(. . . *Continued*)

prior notice or hearing does not violate due process; cited with approval in *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 613-14.)

Newton, *Procedural Due Process and Pre-Judgment Creditor Remedies: A Proposal for Reform of the Balancing Test*, 34 Wash. & Lee L. Rev. 65, 76-77 (1977) (footnote omitted) (hereinafter "Newton"). Nowhere in its legal analysis does the court acknowledge that a defendant may immediately move to dissolve or modify the attachment, and that the trial court must then "proceed to hear and determine such motion expeditiously." Conn. Gen. Stat. § 52-278e(c). The Second Circuit also did not consider that under the Connecticut prejudgment remedy statutes, the defendant has an unqualified right to offer a bond or other property in lieu of the property which has been attached. Conn. Gen. Stat. § 52-304.

There was no indication in this case that the attachment in any way interfered with an attempted alienation of the property, *Pinsky v. Duncan, supra*, 898 F.2d at 863 (Newman, J., dissenting), and the respondent did not move in state court to dissolve or modify the attachment, but instead brought this action. This demonstrates that the deprivation, if any, caused by the attachment in this case was de minimis. *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 610; Newton, *supra* at 76; *Central Sec. Nat. Bank v. Royal Homes, Inc.*, 371 F. Supp. 476, 481 (E.D. Mich. 1974).

The Second Circuit also erred by concluding that Section 52-278e(a)(1) poses a substantial risk of an erroneous deprivation. The Second Circuit found that risk was substantial in non-debtor-creditor disputes such as the instant case, involving an alleged assault and battery, because a judge could not accurately determine probable cause in such disputes based solely on one party's version set forth in an affidavit. *Pinsky v. Duncan, supra*, 898 F.2d at 856. However, the Second Circuit failed to properly consider that the judicial control over the attachment process provided by the Connecticut prejudgment remedy statutes minimizes the risk of an erroneous deprivation. *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 616-17; *see North Georgia Finishing, Inc. v. Di-Chem, supra*, 419 U.S. at 607; *Fuentes v. Shevin, supra*, 407 U.S. at 93. Under the Connecticut prejudgment remedy statutes, defendants are

"not at the unsupervised mercy of the creditor and court functionaries. The . . . law provides for judicial control of the process from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the *ex parte* procedure will lead to a wrongful taking." *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 616-17 (footnote omitted).

The risk of erroneous deprivation also is minimized by the double damages remedy provided by Conn. Gen. Stat. § 52-568, Connecticut's vexatious litigation statute, to a defendant whose property has been wrongfully attached. *See Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 610, 616-17 (potential damages award minimizes the risk of an erroneous deprivation.)

> [P]rior hearings might well be dispensed with in many circumstances in which the state's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law.

Ingraham v. Wright, supra, 430 U.S. at 679 n.47 (1977) (quoting Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405, 431 (1977) (footnote omitted)).

> When only an invasion of a property interest is involved, there is a greater likelihood that a damages award will make a person completely whole than when an invasion of the individual's interest in freedom from bodily restraint and punishment has occurred. In the property context, therefore, frequently a post-deprivation state remedy may be

> all the process that the Fourteenth Amendment requires.

Id. at 701 (Stevens, J., dissenting on other grounds.)

For these reasons, the Second Circuit erred in finding that § 52-278e(a)(1) poses a high risk of erroneous deprivation.[3]

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[3] Conn. Gen. Stat. § 52-568 was not discussed in Section B of Judge Pratt's decision for the Second Circuit, addressing prior notice and hearing. Judge Pratt did discuss this damages remedy in the portion of his decision which was not joined by the other panel members, in which he decided that § 52-278e(a)(1) was constitutionally defective because it did not require the creditor to post an indemnity bond. *Id.* at 857. Judge Pratt decided that this Court in *Mitchell* held that a bond to indemnify the debtor was essential for a deprivation without hearing and notice to be constitutional. Although Judge Pratt implied that a damages cause of action would be an adequate substitute for a bond, he decided that § 52-568 was inadequate, because Judge Pratt read Connecticut law as not allowing a § 52-568 cause of action to be asserted as a counterclaim, but rather as requiring that the debtor wait until the collection action terminates before commencing an action under § 52-568. *Pinsky v. Duncan, supra*, 898 F.2d at 856-58.

In his concurring opinion, Judge Mahoney read Connecticut law as allowing a § 52-568 cause of action to be asserted as a counterclaim in the collection action, and decided that to the extent *Mitchell* required a bond or other security to be provided by the creditor, the requirement was satisfied. *Id.* at 860-61. In dissent, Judge Newman agreed with the concurrence's reading of § 52-568, and decided that the due process clause did not require a bond or damages remedy in favor of the debtor. *Id.* at 864.

Judge Pratt erred in deciding that a bond or a contemporaneous cause of action for wrongful attachment is constitutionally required. This Court has never held that a bond or cause of action for wrongful attachment is required for a deprivation of property without notice and hearing to comport with due process, and in two cases this Court has held that a bond requirement did not save an unconstitutional statute. *See, e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 608 (double bond requirement does not render statute constitutional); *Fuentes v.*

(*Continued . . .*)

The Second Circuit also erred in deciding that the state's interest in postponing the hearing until after attachment was, in the absence of unusual circumstances, "practically nil." *Pinsky v. Duncan, supra*, 898 F.2d at 856. This decision ignores the state's interest in providing "a reasonable and fair framework of rules which facilitate commercial transactions on a credit basis." *North Georgia Finishing, Inc. vs. Di-Chem, Inc., supra*, 419 U.S. at 610 (Powell, J., concurring). "The State's legitimate interest in facilitating creditor recovery through the provisions of garnishment remedies has never been seriously questioned." *Id; Central Sec. Nat. Bank v. Royal Homes, Inc., supra*, 371 F. Supp. at 480 (E.D. Mich. 1974). The Second Circuit's decision also ignores this Court's recognition in *Mitchell* that the state has an interest in facilitating debt collection by allowing a seizure without notice in order to prevent debtors from defeating a creditor's lien by transferring property. *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 608, 609.

As set forth more fully in the Motion for Leave to File Brief of the Amici Curiae, Connecticut banks and creditors have a substantial need to obtain prejudgment security. For many reasons, real estate attachments are the prejudgment security most sought by banks and other creditors in Connecticut. Real estate ownership is a matter of public record in Connecticut and, therefore, real estate owned by a defendant can expeditiously be located. Since a real estate

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Shevin, supra, 407 U.S. at 83 (same). The purpose of a bond or damages cause of action in favor of the debtor is to provide an incentive to the creditor not to effectuate an erroneous deprivation. *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 610, 616-17. Even assuming that a debtor may bring a § 52-568 cause of action only after a collection action has terminated, the incentive for the creditor not to effectuate an erroneous deprivation exists at the time the creditor applies for the attachment. Accordingly, even if a damages remedy is constitutionally required, § 52-568, however interpreted, satisfies that requirement.

attachment is accomplished by recording a certificate on land records, there is no cost (such as storage) to maintain the attachment during the litigation. The value of real estate, as opposed to personal property, typically does not substantially decline during the pendency of litigation. Also, real estate attachments facilitate resolution of debtor-creditor disputes by insuring that a debtor cannot avoid a debt by disposing of assets.

Ex parte real estate attachments are important because they prevent debtors from conveying, encumbering or otherwise alienating real estate prior to attachment. *See Mitchell, supra*, 416 U.S. at 609 ("The danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may furnish a warning to the debtor acting in bad faith."); *North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 610 (Powell, J., concurring) ("[G]arnishment and attachment remedies afford the actual or potential judgment creditor a means of assuring, under appropriate circumstances, that the debtor will not remove from the jurisdiction, encumber or otherwise dispose of certain assets then available to satisfy the creditor's claim."); Scott, *Constitutional Regulation Of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 Va. L. Rev. 807, 847 (1975) (hereinafter "Scott."). *Ex parte* attachments are especially important now because of the current economic downturn in Connecticut, which has substantially increased the number of defaulting debtors, has caused secured real estate loans to become undersecured, and has resulted in debtors going to greater lengths than usual to avoid or delay payment of legitimate debts.[4]

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[4] Section 52-278e(a)(1) does not require as a prerequisite to an *ex parte* real estate attachment that a creditor show that the debtor will dispose of real property if notice is given. The statute upheld by this Court in *Mitchell* also did not require such a showing as a prerequisite to a sequestration of personal property without notice and hearing:

(*Continued . . .*)

The Second Circuit did not consider the substantial societal and private costs of its decision, as it should have. *Mathews v. Eldridge, supra*, 424 U.S. at 347. Inability to obtain *ex parte* prejudgment real estate attachments will increase the likelihood that creditors will be unable to obtain prejudgment security and satisfaction of judgments. As a result of increased cost of enforcement and write-offs of uncollectible loans, the availability of credit in Connecticut will decrease and the cost of credit will increase. *See, e.g.*, Scott, *supra*, at 810, 836-67; Newton, *supra* at 71; *Fuentes v. Shevin*, 407 U.S. at 102-03 (White, J. dissenting) (if preseizure hearings are required "the availability of credit may well be diminished or, in any event, the expense of securing it increased.") These measures will result in decreased lending activity, which would be particularly harmful now, when economic activity and lending in Connecticut are already declining.[5]

(. . . *Continued*)

> Historically, the writ would issue only if the creditor had "good reason to fear" that the debtor would damage, alienate or waste the goods, and the creditor was required to show the grounds for such fear. Under present law, however, the apprehension of the creditor is no longer the issue, and the writ may be obtained when the goods are within the power of the debtor.

Mitchell v. W.T. Grant Co., supra, 416 U.S. at 605, n.4. As the *Mitchell* Court noted, in most instances the creditor will have only an apprehension as to the debtor's plans, because the debtor's intent to transfer property will be known only to the debtor and the intended transferee until the transfer has taken place.

[5] The decision also will impose significant 'direct' or litigation costs on the enforcement process, including operating costs of the parties, lawyers, and litigants. Scott, *supra* at 810, 828, 845-53; *see North Georgia Finishing, Inc., supra*, 419 U.S. at 610 (Powell, J., concurring) ("the recent expansion of concepts of procedural due process requires a more

(*Continued . . .*)

The Second Circuit also failed to consider the state's interest "in conserving scarce fiscal and administrative resources..." *Mathews v. Eldridge, supra*, 424 U.S. at 348. The Second Circuit's opinion is already adversely affecting Connecticut's creditors and courts. Even though the Connecticut Supreme Court has upheld the constitutionality of § 52-278e(a)(1), *Kukanskis v. Griffith*, 180 Conn. 501, 430 A.2d 21 (1980); *Fermont Div., Dynamics Corp. of America v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979), Connecticut courts currently are not entertaining *ex parte* prejudgment real estate attachment applications absent exigent circumstances. As a result, hearings must be held prior to any prejudgment real estate attachments issuing and in some judicial districts hearings are being delayed for five months. The increase in the number of prejudgment remedy hearings and the accompanying backlog in state courts prove the accuracy of this Court's statement in *Mathews, supra*, 424 U.S. at 347 that "[w]e only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial."[6]

The Second Circuit's opinion "has the potential to create chaos within the State's legal and business communities." *Soden v. Johnson*, No. CV 83-0067730-S, slip. op. at 3 (Super. Ct. Stamford-Norwalk, March 26, 1990) (reprinted in Appendix, *see* p. 6A). The Second Circuit erred by failing to consider the state's

(. . . *Continued*)

careful assessment of the nature of the governmental function served by the challenged procedure and of the costs the procedure exacts of private interests.")

[6] This delay in scheduling hearings also is damaging to the state's interest in facilitating debt collections, because as a result of *Pinsky* debtors in Connecticut now have substantial opportunity and time to transfer or encumber their real estate prior to attachment.

interest in facilitating debt collection and the flow of credit in Connecticut.

In *Mitchell*, this Court held that Louisiana's sequestration statutes comported with due process, even though they authorized complete deprivation of personal property without prior notice or hearing, because: a sequestration order could only be issued by a judge based on an affidavit alleging specific facts; the debtor had an opportunity for an early post-seizure hearing to seek dissolution of the order, the debtor could regain possession of the property by posting a bond; and the debtor had a remedy against the creditor for wrongful sequestration. *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 607-619; *see North Georgia Finishing, Inc. v. Di-Chem, Inc., supra*, 419 U.S. at 606-07 (invalidating *ex parte* garnishment statutes for failing to provide safeguards against erroneous deprivation present in *Mitchell*); *Jonnet v. Dollar Sav. Bank of City of New York*, 530 F.2d 1123, 1127 (3d Cir. 1976).

Connecticut's prejudgment remedy statutes, like the Louisiana statutes in *Mitchell*, provide for issuance of the order of attachment only by a judge based on a fact-specific affidavit, provide the debtor with the right to an immediate hearing to seek dissolution, and provide the debtor with a right to substitute a bond for the attachment. The Connecticut prejudgment remedy statutes also require that notice of these rights be served on the defendant, and provide for immediate appellate rights. Additionally, pursuant to Conn. Gen. Stat. § 52-568, the debtor has a double damages remedy for wrongful attachment. *See Pinsky v. Duncan, supra*, 898 F.2d at 860-61 (Mahoney, J., concurring).[7]

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[7] The Second Circuit erroneously attempted to distinguish *Mitchell* by limiting its applicability to cases in which a creditor claimed a pre-existing security interest in the property. *Pinsky v. Duncan, supra*, 898 F.2d at 855. If *Mitchell* was limited to secured transactions, this Court in *North Georgia Finishing, Inc. v. Di-Chem, Inc.* could have invalidated the Georgia garnishment statutes solely because they were not restricted to

(*Continued* . . .)

(. . . *Continued*)

secured transactions. Rather than doing so, this Court invalidated the Georgia statutes because they failed to contain the saving characteristics of the Louisiana statutes in *Mitchell*. Significantly, this Court in *North Georgia Finishing, Inc.* did not even mention that the creditor in *Mitchell* claimed a preexisting interest in the property. *North Georgia Finishing, Inc. v. Di-Chem, supra*, 419 U.S. at 606-07; *see, e.g.*, Note, *Debtors' and Creditors' Due Process: Applying the Balancing Standard*, 29 U. Fla. L. Rev. 554, 561-63 (1977) ("*Di-Chem* expanded the reach of *Mitchell*, for the *Di-Chem* decision implicitly refused to limit *Mitchell* to situations in which the creditor had a prior interest in the property seized. Had the Court chosen to so limit *Mitchell*, *Di-Chem* could have declared the Georgia garnishment statute unconstitutional without applying the balancing test of *Mitchell*") (footnote omitted); Hansford, *Procedural Due Process in the Debtor-Creditor Relationship: The Impact of Di-Chem*, 9 Ga. L. Rev. 589, 605, 608 (1975); Pearson, *Due Process and the Debtor: The Impact of Mitchell v. W. T. Grant*, 29 Okla. L. Rev. 277, 298-300 (1976); Newton, *Fuentes "Repossessed" Reconsidered*, 28 Baylor L. Rev. 497, 506-09 (1976); Kay & Lubin, *Making Sense of the Prejudgment Seizure Cases*, 64 Ky. L.J. 705, 720-21 (1976); Scott, *supra* at 861.

This Court properly has not limited *Mitchell* to secured transactions:

> Ultimately, the interest being vindicated in both *Mitchell* and *Di-Chem* was the creditor's right to receive payment in full on its debts, however they may have arisen. The presence of a particularized property interest like the vendor's lien in *Mitchell* does not enhance the creditor's justification for summary process. Nor does it add measurably to the accuracy of the factual determination which precedes the issuance of a summary writ. The "specific facts" requirement serves that purpose without need for reinforcement. Thus, if the creditor offers detailed and credible proof of a valid debt or other claim, even in the absence of a lien or security interest, summary process can issue without undermining the minimization-of-error rationale.

(*Continued* . . .)

For these reasons, this Court should hold that § 52-278e(a)(1) does not violate the due process clause.[8]

II. THE SECOND CIRCUIT SHOULD NOT HAVE INVALIDATED SECTION 52-278e(a)(1) ON ITS FACE.

"Federal courts . . . have a duty to decide constitutional questions when necessary to dispose of the litigation before them. But they have an equally strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." *County Court of Ulster v. Allen*, 442 U.S. 140, 154 (1979). "It has long been thought that, when dealing with questions of constitutional law, a court is to formulate a rule of constitutional law no broader than is required by the precise facts to which it is to be applied. Principles of judicial economy dictate that constitutional issues should not be decided in the absence of the necessity to do so, and even then, only on an adequate factual record." *Deutsch v. Teel*, 400 F. Supp. 598, 606 (E.D.Wis. 1975). "[D]ecisions reaching the merits of facial constitutional challenges... are the exception and not the rule."

(. . . *Continued*)

Pearson, *Due Process and the Debtor: The Impact of Mitchell v. W. T. Grant*, 29 Okla. L. Rev. 277, 300 (1976) (footnote omitted).

[8]*See Shaumyan v. O'Neill*, 716 F. Supp. 65 (D. Conn. 1989); *Pinsky v. Duncan, supra*, 716 F. Supp. 58; *Read v. Jackson*, Civ. No. B-85-85, slip op. (D. Conn. Feb. 18, 1988); *Armstrong Cumming Architects v. Gruen*, No. B-88-680 (EBB) slip. op. (D. Conn. July 17, 1989); *Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979); *Kukanskis v. Griffith*, 180 Conn. 501, 430 A.2d 21 (1980) (all holding that § 52-278e(a)(1) does not violate the due process clause.)

Martin Tractor Co. v. Federal Election Comm'n, 627 F.2d 375, 381 (D.D.C.), *cert. denied*, 449 U.S. 954 (1980).

The Second Circuit ignored these principles by invalidating § 52-278e(a)(1) on its face rather than analyzing the statute as applied. The Second Circuit apparently was concerned about the risk of an erroneous deprivation in this case, a tort action arising out of an alleged assault and battery. *Pinsky, supra*, 898 F.2d at 856. The court could have addressed this concern and determined the rights of the parties before it by holding § 52-278e(a)(1) unconstitutional as applied.

The Second Circuit erred by invalidating § 52-278e(a)(1) on its face without clear and convincing evidence that the statute operates unconstitutionally in cases in which the statute typically is utilized. Statutes "adjusting the burdens and benefits of economic life" are presumptively constitutional. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). This presumption casts a "heavy burden" on one who alleges unconstitutionality. *Mittelstaedt v. Bd. of Trustees of Univ. of Ark.*, 487 F. Supp. 960, 967 (E.D.Ark. 1980). "[A]ll doubts must be resolved in favor of the statute's legality, and only a clear showing that the statute violates the constitution will justify striking the statute." *Parcell v. Kansas*, 468 F. Supp. 1274, 1276 (D.Kan. 1979), *aff'd sub nom Parcell v. Governmental Ethics Comm'n*, 439 F.2d 628 (10th Cir. 1980).

The presumption of constitutionality and deference to the legislature are especially appropriate in the area of prejudgment remedies because legislatures are better equipped than courts to accomplish efficient resolution of debtor-creditor disputes. *Mitchell v. W. T. Grant Co., supra*, 416 U.S. at 619 n.13 ("The uncertainty evident in the current debate [over the impact of prior notice and hearing on the price of credit] suggests caution in the adoption of an inflexible constitutional rule."); Scott, *supra* at 813, 835, 865, 867; Newton, *supra* at 82.

The Second Circuit invalidated § 52-278e(a)(1) on its face even though it acknowledged, as this Court has, that in creditor-debtor disputes the risk of an erroneous deprivation is minimal because of the presence of written loan documents. *Pinsky v. Duncan, supra*, 898 F.2d at 856; *Mathews v. Eldridge, supra*, 424 U.S. at 345; *Mitchell v. W.T. Grant Co., supra*, 416 U.S. at 609, 617, 618 ("There is thus far less danger here that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing . . ."); *Fuentes v. Shevin, supra*, 407 U.S. at 100, 102-03 (White, J. dissenting) ("It is very doubtful in my mind that such a hearing would in fact result in protections for the debtor substantially different from those the present laws provide."); *see, Scott, supra* at 812, 842-44, 848.[9] The Second Circuit erred by invalidating § 52-278e(a)(1) on its face because there was no evidence adduced that the statute was frequently utilized by tort plaintiffs rather than creditors. Additionally, the court did not consider any evidence of the effects of its decision on the flow of credit and resolution of

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[9] This Court's conclusion that risk of erroneous deprivations is minimal in debtor-creditor disputes is buttressed by the market forces at work. *Scott, supra* at 841; *Fuentes v. Shevin, supra*, 407 U.S. at 100 (White, J. dissenting) "(Sellers are normally in the business of selling and collecting the price for their merchandise . . . it would not seem in the creditor's interest for a default occasioning repossession to occur; as a practical matter it would much better serve his interests if the transaction goes forward and is completed as planned. Dollar-and-cents considerations weigh heavily against false claims of default as well as against precipitate action that would allow no opportunity for mistakes to surface and be corrected") (footnote omitted.)

A 1978 statistical study of Connecticut's prejudgment remedy statutes concluded with respect to preattachment hearings that defendants infrequently appeared to contest attachments, and even when defendants did appear, their appearance had "little or no effect." Shuchman, *Prejudgment Attachments in Three Courts of Two States*, 27 Buffalo L. Rev. 459, 484 (1978); *see* Scott, *supra*, at 812, 817, n.37.

creditor-debtor disputes, or of the additional costs its decision would impose.

"[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge, supra*, 424 U.S. at 344; *Ownbey v. Morgan*, 256 U.S. 94, 103-04 (1921). The Second Circuit erred by relying solely on the allegations of the complaint in this case in deciding that § 52-278e(a)(1) on its face violated the due process clause.[10]

CONCLUSION

For all of the foregoing reasons, the Connecticut Bankers Association and the Savings Banks' Association of Connecticut respectfully submit that the judgment and opinion of the United States Court of Appeals for the Second Circuit that Connecticut

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[10] Even analyzing § 52-278e(a)(1) as applied, the Second Circuit should not have held the statute unconstitutional. As set forth in Section I above, the deprivation, if any, was de minimis because there was no evidence that the attachment in any way interfered with respondent's use or disposition of his property. The Second Circuit also made no determination that the probable cause finding by the state court was erroneous.

General Statutes § 52-278e(a)(1) violates the due process clause of the Fourteenth Amendment should be reversed.

Respectfully submitted,

Allan B. Taylor
Counsel of Record
James J. Tancredi
Kirk D. Tavtigian, Jr.
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

Attorneys for the Connecticut Bankers Association and the Savings Banks' Association of Connecticut

November 1990

APPENDIX

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CONNECTICUT BANKERS ASSOCIATION MEMBERS

American National Bank, Hamden
Bank of Boston Connecticut, Waterbury
Bank of Darien
Bank of East Hartford
Bank of Mystic
Bank of Southeastern Connecticut, Waterford
Bank of Southington
Bank of South Windsor
Bank of Stamford
Bank of Waterbury
BayBank Connecticut, N. A., Hartford
Brookfield Bank
Canaan National Bank
Candlewood Bank & Trust, New Fairfield
Citizens National Bank of Putnam
CityTrust, Bridgeport
Connecticut Bank & Trust, Hartford
Connecticut National Bank, Hartford
Connecticut Valley Bank, Cromwell
Equity Bank, Wethersfield
First Bank of West Hartford
First Central Bank, Hartford
First City Bank
First National Bank-CT, Hartford
First National Bank of Litchfield
First National Bank of Suffield
Fleet Bank of Connecticut
Founders Bank, New Haven
Glastonbury Bank & Trust
Greenwood Bank of Bethel
Housatonic Bank & Trust, Ansonia
Jewett City Trust Company
Lafayette Bank & Trust, Bridgeport

Landmark Bank, Hartford
Manchester State Bank
Merchants Bank & Trust, Norwalk
National Iron Bank, Salisbury
New Canaan Bank & Trust
New England Bank & Trust, Windsor
New Milford Bank & Trust
Norwalk Bank
Putnam Trust Company, Greenwich
Salisbury Bank & Trust, Lakeville
Saybrook Bank & Trust, Old Saybrook
Sentinel Bank, Hartford
Shoreline Bank & Trust, Madison
Summit National Bank, Torrington
Union Trust Company, Stamford
UST Bank Connecticut, Bridgeport
Vernon Bank
Village Bank & Trust, Ridgefield
Wilton Bank

SAVINGS BANKS' ASSOCIATION OF CONNECTICUT MEMBERS

Advest Bank, Hartford
American Bank of Connecticut, Waterbury
American Savings Bank, New Britain
Bank Mart, Bridgeport
Bank of Hartford
Branford Savings Bank
Bristol Savings Bank
Brooklyn Savings Bank, Danielson
Burritt InterFinancial Bancorporation, New Britain
Centerbank, Waterbury
Central Bank, Meriden
Chelsea Groton Savings Bank, Norwich
City Savings Bank of Meriden
Collinsville Savings Society
Colony Savings Bank, Wallingford
Community Savings Bank, Bristol
Connecticut Savings Bank, New Haven
Derby Savings Bank
Dime Savings Bank of Norwich
Dime Savings Bank of Wallingford
Essex Savings Bank
Fairfield County Savings Bank, Norwalk
Farmers & Mechanics Bank, Middletown
Farmington Savings Bank
Financial Federal Savings Bank, Hartford
First Constitution Bank, New Haven
First County Bank, Stamford
Gateway Bank, South Norwalk
Great Country Bank, Ansonia
Guilford Savings Bank
Jewett City Savings Bank
Liberty Bank for Savings, Middletown
Litchfield Bancorp

Mechanics Savings Bank, Hartford
Mechanics & Farmers Savings Bank, FSB, Bridgeport
MidConn Bank, Kensington
Milford Bank
Moodus Savings Bank
Naugatuck Savings Bank
New Haven Savings Bank
New Milford Savings Bank
New England Savings Bank, New London
Newtown Savings Bank
Northwest Bank for Savings, Winsted
Norwalk Savings Society
Norwich Savings Society
People's Bank, Bridgeport
Peoples Savings Bank, New Britain
Putnam Savings Bank
Ridgefield Bank
Savings Bank of Danbury
Savings Bank of Manchester
Savings Bank of Rockville
Society for Savings, Hartford
Southington Savings Bank
Stafford Savings Bank, Stafford Springs
State Bank for Savings, Southington
Suffield Bank
Thomaston Savings Bank
Tolland Bank
Torrington Savings Bank
Union Savings Bank of Danbury
Willimantic Savings Institute
Winsted Savings Bank

D.N. CV 83 0067730 S	)	SUPERIOR COURT
JOHN V. SODEN	)	
V.	)	
ROBERT E. JOHNSON, ET AL.	)	JUDICIAL DISTRICT OF STAMFORD/ NORWALK AT STAMFORD
. . . . .	)	
D.N. CV 89 0105334 S	)	
GREENWICH TILE	)	
V.	)	
MALLOY	)	MARCH 26, 1990
. . . . .	)	
D.N. CV 89 0103308 S	)	
BARNETT BANK	)	
V.	)	
GABOR J. MERTL, ET AL.	)	
. . . . .	)	
D.N. CV 89 010533 S	)	
GREENWICH TILE	)	
V.	)	
MALLOY DEVELOPMENT	)	
. . . . .	)	
D.N. CV 89 0102621 S	)	
NEW CANAAN FOREIGN CAR	)	
V.	)	
G. BARRETT MONTGOMERY	)	

MEMORANDUM OF DECISION
RE: MOTION TO DISSOLVE EXISTING
PREJUDGMENT REAL ESTATE ATTACHMENTS

This memorandum of decision addresses issues raised in motions filed by various defendants with this court to dissolve prejudgment attachments issued against their real estate. The attachments had been obtain *ex parte*, pursuant to Conn. Gen. Stat. § 52-278e. Section 52-278e has subsequently and very recently been declared to be unconstitutional on its face by the Second Circuit Court of Appeals. The Second Circuit's opinion, announced in *Pinsky v. Duncan*, No. 89-7521 (2nd Cir. March 9, 1990), found that Connecticut's *ex parte* prejudgment real estate attachment statute was unconstitutional on its face in that it deprived a defendant of his right to a hearing prior to issuance of the attachment in violation of the due process clause of the 14th Amendment to the United State Constitution. Not surprisingly, the *Pinsky* decision has generated a great deal of controversy about the continued validity of existing prejudgment real estate attachments, and has given rise to a flurry of motions to dissolve such attachments. This memorandum will address such motions generally.

At the outset, this court acknowledges that it is bound by the decisional law of our Supreme Court. However, the court also recognizes that the *Pinsky* decision has the potential to create chaos within the state's business and legal communities. Therefore, the issues raised by the *Pinsky* decision in the motions before this court should be addressed.

While decisions of federal courts passing on federal constitutional questions should be afforded due respect by the state courts, the federal courts exercise no appellate court jurisdiction over state courts. *See United States ex. rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970); *People v. Brisbon*, 129 Ill. 2d 200, 544 N.E. 2d 297, 135 Ill. Dec. 801 (Ill. 1989). Until the United States Supreme Court has spoken, state courts are not precluded from exercising their own judgments on federal

constitutional questions. *United States ex rel. Lawrence v. Woods*, 432 F.2d at 1075, quoting the Supreme Court of Iowa in *Iowa Nat'l. Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445, 454 (1930).

Our Supreme Court has spoken on the question of the constitutionality of Conn. Gen. Stat. § 52-278e and has determined that the statute meets the due process standards of the state and federal constitutions. *Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 397, 423 A.2d 80 (1979). Consequently, at this point in the process of judicial review of § 52-278e, this trial court is bound by the Connecticut Supreme Court's finding of constitutionality in *Fermont*. The opinions of the Supreme Court of Connecticut are binding upon the Superior Court and ... until the court's decisions are changed, the Superior Court is bound to follow them. *Montes v. Hartford Hospital*, 26 Conn. Sup. 441, 442-43 (1966). Accordingly, as to the motions before this court which seek to vacate or dissolve existing prejudgment real estate attachments on the grounds of the Second Circuit Court of Appeals ruling in *Pinsky*, the motions are denied under *Fermont*.

However, even if this court were not bound by *Fermont*, and were to follow the *Pinsky* ruling, the question of whether *Pinsky* should be applied retroactively to invalidate all existing real estate attachments obtained through *ex parte* orders would still remain to be determined. In the interest of eliminating the speculation and uncertainty attendant to this issue, the following discussion is provided.

The United States Supreme Court considered the question of nonretroactive application of judicial decisions within a civil context in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.E. 2d 296, 92 S. Ct 349 (1971). In *Chevron*, the court identified the three factors to be weighed in each case to determine whether a judicial decision should be applied retroactively or prospectively. *Id.* at 106. First, the decision must establish a new principle of law, either by overturning clear past precedent or by deciding an issue of first

impression. *Id.* Second, the court must determine whether retrospective application of the new rule will further or retard its operation in each case. *Id.* at 107. Finally, if retroactive application of the court's decision could produce substantial inequitable results, there is ample basis for avoiding the hardship by a holding of nonretroactivity. *Id.* at 107.

Turning to the issue raised here by retroactive application of the *Pinsky* ruling, namely the continued validity of existing *ex parte* real estate attachments obtained pursuant to § 52-278e, the court concludes the new rule would be applied prospectively only.

A weighing of the merits and demerits of retroactive application of the *Pinsky* rule to existing *ex parte* real estate attachments in Connecticut demonstrates that substantial inequitable results may occur if *Pinsky* is not limited to prospective force. The decision clearly overturns past legal precedents in this state and renders unlawful statutory procedures upon which Connecticut litigants have reasonably relied. Retroactive operation of the decision will not further the operation of the rule. On the contrary, retroactive application of *Pinsky* would create hardship and injustice to creditors who have lawfully obtained attachments to secure their interests. The disruptive effect of summary dissolution of existing real estate attachments would be far-reaching and potentially devastating to an orderly business community. Issues relating to the validity of title to real estate and priority of secured interests would be implicated.

For the foregoing reasons, this court would follow the reasoning of the Supreme Courts of Massachusetts and Rhode Island, as well as the District Court of Massachusetts when, upon invalidating similar prejudgment real estate attachment statutes, those courts expressly held their decisions to have prospective application only. *See Marran v. Gorman*, 359 A.2d 694 (1976); *Bay State Harness Horse Racing and Breeding Ass'n. v. PPG Industries, Inc.*, 365 F. Supp. 1299 (D. Mass. 1973); *McIntyre v. Associates Financial Services Co.*, Mass., 328 N.E. 2d 492 (1975).

/s/
CHIOFFI, J.

Decision entered in accordance with the foregoing dated this 26th day of March, 1990.

John Morrow
Chief Clerk

All counsel notified. J.M.